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**Enlisting science in the
'war on crime':
Key controversies generated by
the South African
Criminal Law (Forensic Procedures) Amendment
Bill**

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CHAPTER 1: INTRODUCTION

Crime control and prevention techniques and approaches in the pursuit of public safety have been a matter of importance for authorities the world over.¹ Polices have long oscillated between the reactive and proactive ends of the continuum.² Crime policies and operational strategies do not of course exist in a vacuum. On the contrary, such policies and strategies are subject to the influences of social, political and even geographical factors.³ The South African case provides an illustrative example of the interplay between context and policy – particularly after 1994.⁴

The rise in crime levels since the early 1990s has posed serious challenges for the South African Police Service (SAPS) as the new regime set about trying to establish a legitimate and effective police institution.⁵ While police reform strategies were being pursued, efforts at addressing the rising crime rates were also put in place. The most notable attempt was the National Crime Prevention Strategy (NCPS) adopted in 1996.⁶ The NCPS placed strong emphasis on a social crime prevention approach whilst recognising the importance of a functioning law enforcement machinery. Before long, however, the initial emphasis on social prevention gave way to more pronounced reactive law enforcement strategies. By the late 1990s tougher approaches to crime were being advocated. In years to come political rhetoric invoked ‘war on crime’ metaphors.⁷ Many factors fuelled the war on crime discourse. Fear of crime played a critical role. At a more structural level, political strategies were also being influenced by the rise of a so-called ‘risk-society’ – the central features of which are outlined by various international scholars.

The results of the ‘war on crime’ approach adopted by governing bodies in South Africa included excessive stress on the importance of re-engineering core components of the criminal justice system (CJS)⁸ in the face of systemic overload in courts and prisons in particular. Against this background various reviews of the criminal justice system were initiated. Detailed proposals for the renovation of different aspects of the CJS followed suit.⁹

¹ M Lianos and M Douglas ‘Dangerization and the end of deviance’ (2000) 40 *British Journal of Criminology* 261

² D Garland and R Sparks ‘Criminology, social theory and the challenge of our times’ (2000) 40 *British Journal of Criminology* 189

³ Ibid

⁴ M Shaw ‘The politics of police change’ in *Crime and policing in post-Apartheid South Africa* (2001)

⁵ J Rauch ‘Police reform and South Africa’s transition’ at *South African Institute for International Affairs conference* (2000)

⁶ Ibid

⁷ Ibid

⁸ Rauch (note 5)

⁹ Ibid

Elsewhere, the role of criminal intelligence in achieving justice and fighting crime was growing significantly in relevance, importance and popularity.¹⁰ Internationally, technologies were being developed at a significant rate allowing for the adaptation of various ‘authorised arrangements’ to purposes and intents for which they were not originally envisaged in a phenomenon termed ‘function creep’.¹¹ Methods of control and surveillance were expanding and perceptions of the need for these functions were allowing for their extension into areas of personal autonomy.¹² Various authors have tried to make sense of such developments. For example, for Michelle Foucault the shift in the governance of security towards ‘self-governance’ (and the condition of the ‘risk society’) fed into the expansion of these mechanisms by demanding effective methods for the reduction of risk. Nelkin and Andrews¹³ to describe how surveillance has become an integral part of modern society, especially for the purposes of social control.¹⁴ Such developments have taken place – often with little concern for the consequences of limitations to liberty.¹⁵

Forensic science, being the utilisation of scientific principles and techniques for purposes of police’s criminal investigation,¹⁶ came to the fore in these circumstances due to the assumed efficiency of these techniques in contributing to the criminal intelligence field.¹⁷ The development of the technology of databases and the adaptation of DNA analysis to criminal investigations thrust the forensic sciences into the limelight of criminal intelligence.¹⁸ Despite the fact that forensic methods carry with them certain ethical difficulties due to the potential of encroachment of human liberties and rights through the associated mechanisms of surveillance, the field of forensics has been seen as an efficient risk-reducing apparatus.¹⁹

Global developments have permeated the local context too. Much has been spoken about the inefficiency of the South African criminal intelligence division. By 2007 a Seven-point plan was drafted after internal investigations by the SAPS, the Department of Justice and Constitutional Development (DoJ), the Department of Correctional Services (DCS) and the National Prosecuting

¹⁰ O Ribaux et al. ‘The contribution of forensic science to crime analysis and investigation’ (2004) 156 *Forensic Science International* 171

¹¹ JY Dahl and AR Sætнан ‘“It all happened so slowly” – On controlling function creep in forensic DNA databases’ (2009) *International Journal of Law, Crime and Justice* 37

¹² Ibid

¹³ Ibid

¹⁴ Ibid, at 690-691

¹⁵ D Nelkin and L Andrews ‘DNA identification and surveillance creep’ (1999) 21 *Sociology of Health and Illness* 689

¹⁶ WS Becker ‘In the crime lab’ (2006) 43 *The Industrial-Organisational Psychologist* 21

¹⁷ Nelkin and Andrews (note 15)

¹⁸ Dahl and Sætнан (note 11)

¹⁹ C McCartney *Forensic identification and criminal justice: forensic science, justice and risk* (2006)

Authority (NPA).²⁰ This national strategy, once again, called for a more integrated criminal justice system. One of the avenues identified through which to attain this was the modernisation of investigative techniques and equipment.²¹

Development of the forensic field would first require the development of legislation authorising the use of advanced forensic techniques so as to empower the currently employed techniques and allow for the introduction of new techniques. The Criminal Law (Forensic Procedures) Amendment Bill (from hereon referred to as 'the Bill') was drafted to achieve this very aim.²² The DoJ compiled the Bill in 2008 and it was adopted by Cabinet at the end of the same year.²³ The necessity of the Bill for the improvement of the investigative division of the police was stressed and the Parliamentary proceedings of the Bill were fast-tracked in an effort to have the legislation passed as quickly as possible.²⁴ The Bill was introduced into Parliament in January of 2009 and an Ad Hoc Committee was formed to deal solely with the Bill and have it passed timeously for the next step of the procedure.²⁵ However, the controversial issues related to the ethical infringements of the techniques alluded to before created a massive stumbling block in processing of the Bill with the result being that the legislation is yet to be passed.

The considerations of the ethical concerns associated with the forensic techniques have been taken on in other jurisdictions where methods of this nature have been in utilisation.²⁶ However, the South African situation remains somewhat unique as the social, political and economic influences have created a particular outlook on these issues. Deliberations allowed the input of stakeholders in various capacities²⁷ and the decisions of the lawmakers have had to take these additional considerations into account. The biased nature of the deliberations due to the interests of the various participants have had a significant influence on the outcomes of the debates and for this reason, a contextualisation of the situation and topics would be of value in the determination of the

²⁰ Presentation to the Portfolio Committees on Justice and Constitutional Development and Safety and Security, 5 August 2008, www.info.gov.za/aboutgovt/programmes/rcjs/cjsr_presentation.pdf, accessed January 2009

²¹ Ibid

²² V Lynch and C Hancock 'DNA: The 21st Century Detective' (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

²³ General Notice 1584 of 2008, GG 31759 29 December 2008, Announcements, Tablings and Committee Reports No2 – 2009 13 January 2009

²⁴ Deputy Minister of Justice and Constitutional Development, Mr Johnny de Lange, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill, 20 January 2009

²⁵ Announcements, Tablings and Committee Reports No2 – 2009 13 January 2009

²⁶ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51

²⁷ Report by the Joint Task Team on the Legislative Process in Parliament 'Reviewing the legislative process in Parliament' 13 November 2008, <http://www.pmg.org.za/node/14578>, accessed January 2009

significance of the discussions. The focus of this research is to offer this input while taking into account the various situations under which these debates have occurred.

The discussion will begin with an outline of the Bill with particular reference to the aims, content and processing of the Bill until this point. An establishment of the scientific principles and techniques involved in the forensic procedures of finger printing, body printing and DNA analysis will then follow so as to provide an understanding of the implications of the Bill. A description of the development of the legislation regulating these procedures and the controversies experienced in other jurisdictions is then offered, followed by an account of the discussions held in the South African Parliamentary meetings for the deliberation of the Bill. Finally, an analysis of these debates and their relevance in the criminological field is explained, including recommendations for how the contentious issues can be approached in the legislation.

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CHAPTER 2: THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL

The motivations for the drafting of the Bill were spelled out by the Deputy Minister of the Department of Justice and Constitutional Development (DoJ) in the first meeting of the Ad Hoc Committee for Criminal Law (Forensic Procedures) Amendment Bill held on 20 January 2009.²⁸ These motivations related to the benefits of the utilisation of the forensic procedures outlined in the Bill (finger- and body-print identification and DNA analysis) including contributions not only to investigation procedures, but also in court processes, by increasing the conviction rates,²⁹ possibly increasing the incidence of plea bargains and guilty pleas,³⁰ and by improving the accuracy of the system by effecting exoneration of innocent people.³¹ It has even been proposed that these techniques will result in the deterrence of crime if utilised correctly.³² All in all, the Bill was seen as a valuable tool in effecting the aims of the Seven-Point plan both directly and indirectly.

2.1 The aims of the Bill

The necessity of this piece of legislation in achieving the aims set out by the sixth point of the seven-point-plan lies in the state of the current legislation governing the practices of forensic procedures.³³ Present legislation is desperately inadequate with regards to empowering the tools of finger printing, DNA analysis, body printing and photographing for means of criminal investigation.³⁴ The Criminal Procedure Act (CPA) of 1977³⁵ is currently the only legislation that deals with the ascertainment of bodily features for the purposes of criminal investigation but the

²⁸ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting – Briefing by Deputy Minister of the Department of Justice and Constitutional Development, 20 January 2009

²⁹ M Briody 'The effects of DNA evidence on homicide cases in court' (2004) 37 *The Australian and New Zealand Journal of Criminology* 231

³⁰ M Briody 'The effects of DNA evidence on sexual offence cases in court' (2002) 14 *Current issues in Criminal Justice* 159

³¹ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

The value of DNA profiling for the exoneration of innocent people is demonstrated by The Innocence Project, an American organisation dedicated to this cause. It was founded in 1991 and has exonerated 245 innocent people to date using DNA evidence. For more information, see <http://www.innocenceproject.org/>, accessed 11 December 2009

³² Ibid

³³ Ibid

³⁴ Submission by the DNA Project for the Ad Hoc Committee of the Criminal Law (Forensic Procedures) Amendment Bill. 3 February 2009

³⁵ Criminal Procedure Act 51 of 1977. See Annexure B

provisions in this Act are limiting with regard to finger- and body printing and do not address the issue of DNA collection at all.³⁶

Section 37 of the CPA³⁷ deals with the taking of fingerprints, palm-prints and foot-prints in criminal cases although this does not address the use of these techniques for investigative purposes.³⁸ It does not make the taking of fingerprints of an accused person compulsory, even if that person is convicted.³⁹ The Act restricts the type of body-prints that could be taken (again, not compulsory) to palm-prints and footprints when new technology allows that prints of other body parts can be used to identify the presence of a perpetrator.⁴⁰ The CPA requires that all prints be destroyed if the accused is not convicted or if the charges against them are dropped.⁴¹ Both of these issues limit the investigative capacity of the police and would need to be amended for purposes of empowering them.⁴² Additionally restrictive to the use of these techniques is the legal and capacitative limitation of the use of fingerprint databases for identification and investigative purposes.⁴³ At present SAPS makes use of an Automated Fingerprint Identification System (AFIS) but this system is not fully developed and is currently insufficient for effective investigative purposes.⁴⁴ However, the Department of Home Affairs (DHA) and the Department of Transport (DoT) have their own operational fingerprint databases, Home Affairs National Identification System (HANIS) and the electronic National Transport Information System (eNaTIS) respectively

³⁶ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting – Briefing by Deputy Minister of the Department of Justice and Constitutional Development, 20 January 2009

³⁷ Criminal Procedure Act 51 of 1977 S37: '**Powers in respect of prints and bodily appearance of accused.**—(1)' For the full clause, see the Criminal Procedure Act in Annexure B

³⁸ Annexure B, Briefing of Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill by the Deputy Minister of Justice and Constitutional Development, 20 January 2009

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Criminal Procedure Act 51 of 1977 S37 '(5) Fingerprints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person. [Sub-s. (5) substituted by s. 1 (c) of Act No. 64 of 1982.]'

⁴² Annexure B, Briefing of Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill by the Deputy Minister of Justice and Constitutional Development, 20 January 2009

⁴³ Ibid

⁴⁴ Ibid

AFIS is a software program. It allows fingerprints to be uploaded and stored in a digital database which is under the control of the SAPS. The fingerprints stored on the database are those of arrested persons as stipulated in the CPA 51 of 1977 (see note 37). When loaded onto the database, the program allocated each fingerprint a set of numbers according to the patterns of loops, whorls and arches and the fingerprint is thus converted to digital form. AFIS allows unidentified fingerprints to be compared with those stored in the database for possible matches. Biometric government in the new South Africa, Ken Breckenridge. Available at <http://wiserweb.wits.ac.za/PDF%20Files/state%20-%20breckenridge.PDF>

The insufficiencies of the AFIS system are due to the limited number of fingerprints available in the database and the limited availability of the system to all areas where it is required.

but SAPS do not have access to these databases.⁴⁵ These databases contain over 38 million prints together and access to these databases will increase the chances of identification immeasurably.⁴⁶

Furthermore, since the CPA was drafted in 1977, the technique of DNA analysis for means of identifying perpetrators is not addressed as it had not yet been developed.⁴⁷ An audit conducted by the Office for Criminal Justice System Reform (OCJSR) revealed that while the CPA allows for the collection of blood samples in a criminal case,⁴⁸ no mention is made of the collection of bodily samples for the purposes of DNA analysis, nor does it provide for the establishment and utilisation of a DNA database.⁴⁹

The Firearms Control Act of 2000⁵⁰ as well as the Explosives Act of 2003⁵¹ both include instructions on the taking of fingerprints and bodily samples and although these provisions do not correspond directly with those stipulated in the CPA,⁵² they are also restrictive for the purposes of criminal investigation and identification.

The aims of the new Bill have been stipulated as amending these existing statutes so as to allow for the effective utilisation of forensic techniques for criminal investigative purposes.⁵³ It has been drafted with the following intentions as listed in the preamble of the Bill.⁵⁴ The Bill aims to provide for the compulsory finger printing of certain categories of persons including arrestees and convicted persons, to allow access to other fingerprint databases for investigative purposes, to authorise the use of techniques such as finger- and body printing and DNA analysis for purposes

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Submission by the DNA Project for the Ad Hoc Committee of the Criminal Law (Forensic Procedures) Amendment Bill. The meeting which address public submissions took place on 3 February 2009

⁴⁸ Criminal Procedure Act 51 of 1977 S37, para (2), (3), (4) and (5). See Annexure B

⁴⁹ Annexure B, Briefing of Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill by the Deputy Minister of Justice and Constitutional Development, 20 January 2009

⁵⁰ Firearms Control Act No. 60 of 2000

⁵¹ Explosives Act 15 of 2003

⁵² Ibid

⁵³ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Preamble. See Annexure A

⁵⁴ Ibid (note 53) 'To amend the Criminal Procedure Act, 1977, so as to further regulate powers in respect of the ascertainment of bodily features of persons; to provide for the compulsory taking of fingerprints of certain categories of persons; to provide for the taking of prints and samples for investigative purposes; to provide for the taking of specified bodily substances from certain categories of persons for the purposes of DNA analysis; to provide that prints and samples taken under the Act are retained; to further regulate proof of certain facts by affidavit or certificate; to further regulate evidence of prints or bodily features of accused; to amend the South African Police Service Act, 1995, so as to regulate the storing and use of fingerprints, palm-prints, foot-prints and photographs of certain categories of persons; and to establish and regulate the administration and maintenance of the National DNA Database of South Africa; to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of bodyprints and bodily samples; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of prints and samples for investigation purposes; and to provide for matters connected therewith.'

of investigations, to specifically provide for the collection of bodily samples for the purpose of DNA analysis, to authorise the retention of these prints and samples, to regulate the storage and use of DNA profiles in databases and to instruct the management of these databases. Consideration of the relevant safeguards in order to achieve these aims were made and these were included in the Bill. These focussed on facilitating for the retention of privacy through limiting the availability of information to unauthorised persons.

2.2 Overview of the contents of the Bill

The Bill begins with the amendments to be made to the CPA.⁵⁵ Section 36A⁵⁶ of the CPA is amended to include a number of new definitions pertaining to the collection of fingerprints, body-prints and bodily substances for the purposes of DNA collection as well as to the National DNA Database of South Africa (NDDSA). This section reads as follows with the brackets indicating insertions in the original legislation:

‘[36A. (1) For the purposes of this Chapter, unless the context indicates otherwise—

(a) ‘authorised person’ means in reference to—

(i) photographic images, fingerprints or body-prints, any police official in the performance of his or her official duties; or

(ii) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate;

(b) ‘body-prints’ means prints taken from a person’s ear, foot, nose, palm or toes;

(c) ‘child’ means a person under the age of 18 years;

(d) ‘DNA’ means deoxyribonucleic acid;

(e) ‘DNA analysis’ means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance;

(f) ‘DNA profile’ means the results of forensic DNA analysis of an intimate sample, a non-intimate sample or any other bodily substance;

(g) ‘intimate sample’ means a sample of blood other than a blood finger prick;

(h) ‘NDDSA’ means the National DNA Database of South Africa, established in terms of section 15F of the South African Police Service Act;

(i) ‘non-intimate sample’ means—

(i) a sample of hair other than pubic hair;

(ii) a sample taken from a nail or from under a nail;

(iii) a swab taken from the mouth (buccal swab);

(iv) a blood finger prick; or

(v) a combination of these;

(j) ‘South African Police Service Act’ means the South African Police Service Act, 1995 (Act No. 68 of 1995); and

(k) ‘speculative search’ means that the body-prints, fingerprints, photographic images, intimate samples or non-intimate samples or the information derived from such samples taken, under any power conferred by this Chapter, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against—

(i) in the case of photographic images, body-prints or fingerprints, the databases of the South African Police Service, the Department of Home Affairs, the Department of

⁵⁵ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 1-5. See Annexure A

⁵⁶ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2. See Annexure A

Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this Act; or (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, the NDDSA.

(2) For the purposes of this Chapter, unless the context indicates otherwise, any reference to a 'person' includes a 'child'.⁵⁷

The major changes that are effected by these definitions include the broadening of the definition of the term 'body prints' to incorporate ear, nose, toe, foot and palm,⁵⁸ the classification of 'non-intimate' samples,⁵⁹ and the definition of 'intimate' samples.⁶⁰ The other definitions are straight forward although the definitions of 'DNA analysis', 'DNA profile' and 'speculative search' are necessary for the new provisions referring to these concepts. An important aspect of these definitions is the inclusion of the HANIS and eNaTIS databases for purposes of fingerprint comparisons.⁶¹

The next section of the amended CPA, Section 36B,⁶² stipulates that fingerprints and non-intimate samples have to be taken by police officers from all arrested persons, together with those persons having been convicted, granted bail or summons by court for a Schedule 1 offence.⁶³ It allows these samples to be analysed and compared with the respective databases.⁶⁴ Safeguards against the

⁵⁷ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2, S 36A. See Annexure A

⁵⁸ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2, S 36A (b). See Annexure A

⁵⁹ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2, S 36A (i). See Annexure A

⁶⁰ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2, S 36A (g) See Annexure A

⁶¹ Ibid

⁶² Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2, S36B. See Annexure A

⁶³ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2S36B '(1) A police official must—

(a) take the fingerprints or must cause such prints to be taken of any—

(i) person arrested upon any charge;

(ii) person released on bail or on warning under section 72, if such person's fingerprints were not taken upon arrest;

(iii) person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed;

(iv) person convicted by a court and sentenced to—

(aa) a term of imprisonment, whether suspended or not; or

(bb) any non-custodial sentence,

if a non-intimate sample was not taken upon arrest;

(v) person convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph; or

(vi) person deemed under section 57(6) to have been convicted in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph;

(b) take a non-intimate sample or must cause such sample to be taken of any..' (as for para (a))

⁶⁴ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2 S36B '(5) The fingerprints, non-intimate samples or the information derived from such samples, taken under any power conferred by this section, may be the subject of a speculative search.

(6) (a) Subject to paragraph (b), the fingerprints, non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it

use of this information for purposes other than criminal investigations involve punishment of maximum 15 years imprisonment or a fine.⁶⁵ Originally, this section instructed the indefinite retention of these samples but this has since been officially changed so that the information of convicted is retained indefinitely but the information of acquitted or uncharged persons is destroyed after five years.⁶⁶

Section 36C allows police officers to take body prints, fingerprints and non-intimate samples from any person suspected of committing an offence or when deemed necessary for the investigation of a crime at the discretion of the police officer without a warrant.⁶⁷ Similarly, Section 37 allows for

was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Nothing in paragraph (a) shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any fingerprints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.'

⁶⁵ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2S 36B '(c) Any person who uses or who allows the use of the fingerprints, non-intimate samples or the information derived from such samples as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.'

⁶⁶ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting – Briefing by Deputy Minister of the Department of Justice and Constitutional Development, 20 January 2009, S36B '(8) Despite subsection (6)(a), the fingerprints, non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.'

⁶⁷ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2 s36C. '(1) Any police official may without a warrant take fingerprints, body-prints and non-intimate samples of a person or a group of persons, if there are reasonable grounds to—

(a) suspect that the person or that one or more of the persons in that group has committed an offence; and
(b) believe that the prints or samples or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of the persons as possible perpetrators of the offence.

(2) The person who has control over prints or samples taken in terms of this section may—

(a) examine them for the purposes of the investigation of the relevant offence or cause them to be so examined; and

(b) cause any prints, non-intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search.

(3) (a) The fingerprints, body-prints or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Any person who uses or who allows the use of the fingerprints, body-prints, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(c) The fingerprints and body-prints referred to in paragraph (a) must be stored by the Division: Criminal Record and Forensic Science Service of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act.

(d) The non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act.

the body printing and photographing of all arrested persons by and at the discretion of a police officer.⁶⁸ The taking of intimate samples is also regulated in this section, authorising only medical practitioners to perform this task either at their own discretion, at the request of a police officer or under the order of a court.⁶⁹ The five year retention period for unconvicted persons is stipulated in these sections⁷⁰ as well as the safeguards as in Section 36B.

(4) Despite subsection (3)(a), the fingerprints, body-prints, non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.’.’

⁶⁸ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2s37. ‘(1) Any police official may—

(a) take the body-prints or may cause any such prints to be taken—

(i) of any person arrested upon any charge;

(ii) of any such person released on bail or on warning under section 72;

(iii) of any person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of section 40(1);

(iv) of any person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or

(v) of any person convicted by a court; or

(vi) of any person deemed under section 57(6) to have been convicted in respect of any offence which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph;’

⁶⁹ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 3 S37 ‘(2) (a) Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse must take such steps, including the taking of an intimate sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) or paragraph (a)(i) or (ii) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.

(b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of an intimate sample of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take an intimate sample of such person or cause such sample to be taken: Provided that such sample must be taken if requested by any police official.

(3) Any court before which criminal proceedings are pending, may—

(a) in any case in which a police official is not empowered under subsection (1) or section 36B(1) to take fingerprints, body-prints or a non-intimate sample or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of an intimate sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;

(b) order that the steps, including the taking of an intimate sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.’

⁷⁰ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 3 S37 ‘(8) Despite subsection (6)(a), the fingerprints, body-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.’.’

Section 212 of the CPA deals with the chain of evidence and the validation of the collection and receipt of forensic samples.⁷¹ The fourth clause of the Bill⁷² amends this Section so as to include body prints, intimate and non-intimate samples as evidence for consideration in this regard.

Section 225 of the CPA is amended in Clause 5⁷³ of the Bill so as to authorise the admissibility of the evidence generated by identification procedures in a court of law, although this evidence will not be ruled inadmissible if the guidelines stipulated in the Bill are not followed. The provision appears in the Bill as follows:

‘(1) Whenever it is relevant at criminal proceedings to ascertain whether any fingerprint, ~~palm-print or foot-print~~ [body-print, intimate sample, non-intimate sample or the information derived from such samples, as defined under Chapter 3,] of an accused at such proceedings corresponds to any other fingerprint, ~~palm-print or foot-print~~ [body-print, intimate sample, non-intimate sample, bodily substance or the information derived from such samples or bodily substance] or whether the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the fingerprints, ~~palm-prints or foot-prints~~ [or body-prints] of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test [or DNA analysis of an intimate sample or a non-intimate sample, as defined under Chapter 3], of the accused, shall be admissible at such proceedings.
(2) Such evidence shall not be inadmissible by reason only thereof that the fingerprint, ~~palm-print, or foot-print~~ [body-print, intimate sample or non-intimate sample] in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of ~~section~~ [sections 36B, 36C or] 37, or that it was taken or ascertained against the wish or the will of the accused person concerned.’’.

Clause 6 of the Bill serves to insert two chapters, 5A and 5B into the SAPS Act of 1995.⁷⁴ Chapter 5A addresses the management and use of the databases storing fingerprints, body prints and photographs.⁷⁵ It places the National Commissioner and his or her delegate in charge of the creation, maintenance and use of these databases exclusively for criminal investigative purposes⁷⁶

⁷¹ Criminal Procedure Act 51 of 1977, Chapter 24, S 212, para (6). See Annexure B

⁷² Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 4. See Annexure A

⁷³ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 5. See Annexure A

⁷⁴ South African Police Services Act 68 of 1995

⁷⁵ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15A**. ‘(1) The National Commissioner or his or her delegate must ensure that fingerprints, body-prints and photographic images taken under—
(a) section 36B(1)(a), section 36C(1) or section 37 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
(b) section 113 of the Firearms Control Act, 2000 (Act No. 60 of 2000);
(c) section 9 of the Explosives Act, 2003 (Act No. 15 of 2003); or
(d) any Order of the Department of Correctional Services, are stored, maintained, administered, and readily available, whether in computerised or other form, and shall be located within the Division: Criminal Record and Forensic Science Service.’

⁷⁶ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15A** ‘(4) Subject to subsection (5), the fingerprints, body-prints and photographic images referred to in subsections (1), (2) and (3) shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.’

(AFIS) and includes a provision for the use of the HANIS and eNaTIS databases for fingerprint identification purposes.⁷⁷

Chapter 5B deals with the ‘establishment, administration and maintenance’ of the NDDSA for use in criminal intelligence, identification of perpetrators and the identification of missing persons or unidentified human remains.⁷⁸ The NDDSA is placed under the control of the Division: Criminal Record and Forensic Science Services of the SAPS with the administration and maintenance thereof charged to the National Commissioner or his or her delegate.⁷⁹ Sections 15F, G, H, I, J and K⁸⁰ instruct that the NDDSA is to consist of five indices,⁸¹ namely a crime scene index (containing profiles of samples collected from crime scenes),⁸² a reference index containing the profiles of samples collected from suspects together with their identities,⁸³ a convicted offender index containing the profiles of convicted offenders together with their identities (this applies retrospectively),⁸⁴ a volunteer index containing the profiles of samples taken from any person with his or her informed consent (which cannot be withdrawn)⁸⁵ and, finally, a personnel, contractor and supplier index containing the profiles of samples collected from police officials involved in a case and from any person directly involved with the DNA analysis process or the servicing of equipment.⁸⁶ Specific provisions relating to the consent of a child when volunteering a DNA sample are made so that parents or guardians can give consent and this consent can be contested when the child turns 18.⁸⁷ Sections 15L and 15M restrict the communication of the results of a speculative search to the concerned parties,⁸⁸ and allows foreign states to request the use of the

⁷⁷ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15B**. ‘(1) Any fingerprints, body-prints or photographic images stored in terms of this Chapter, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked against the databases of the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this Act.’

⁷⁸ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter 5B. See Annexure A

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ s15F

⁸² s15G

⁸³ s15H

⁸⁴ s15I

⁸⁵ s15J

⁸⁶ s15K

⁸⁷ Ibid

⁸⁸ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15L** ‘(2) The information referred to in subsection (1) may only be communicated in the circumstances set out in that subsection and may only be communicated to—

(a) a police official;

(b) a prosecutor;

(c) a judge;

NDDSA for a comparison against a profile for investigative purposes,⁸⁹ respectively. Section 15N requires that techniques of DNA analysis be subject to a set of standards compiled by the National Commissioner in both state and private laboratories.⁹⁰ Section 15O stipulates that samples should be stored safely, can be destroyed if no longer necessary, and must be destroyed after five years if the donor of the sample is not convicted by a court of law while DNA profiles cannot be destroyed.⁹¹ Section 15P criminalises the use of the database for any purpose other than criminal

(d) a magistrate;

(e) a court; or

(f) for criminal defence purposes, an accused person, or where the accused is a child to his or her parent or guardian, or his or her legal representative.'

⁸⁹ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15M**. '(1) Subject to subsection (3), the National Commissioner or his or her delegate may, on receipt of a DNA profile from a foreign state, compare the profile with those in the NDDSA, for purposes related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution, and may then communicate the following information:

(a) If the DNA profile is not contained in the NDDSA, the fact that it is not; or

(b) if the DNA profile is contained in the NDDSA, all the information that the National Commissioner or his or her delegate considers appropriate, as contained in the NDDSA in relation to that DNA profile.

(2) Subject to subsection (3), the National Commissioner or his or her delegate may, on the request of an investigating officer, for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, communicate a DNA profile contained in the Crime Scene Index to a foreign state.

(3) Any steps taken under subsection (1) or (2), other than requests relating to missing persons or unidentified human remains that do not relate to the detection of crime, the investigation of an offender or the conduct of a prosecution, must be in accordance with the provisions of the International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996), or, where applicable, in terms of an existing Treaty.'

⁹⁰ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15N**. '(1) The National Commissioner or his or her delegate must develop recommended standards for quality assurance, including standards for testing the proficiency of forensic science laboratories and forensic analysts in conducting analysis of DNA.

(2) The standards referred to in subsection (1) must—

(a) specify criteria for quality assurance and proficiency tests to be applied to the various types of DNA analysis used by forensic laboratories; and

(b) include a system for grading proficiency testing performance to determine whether a laboratory is performing acceptably.

(3) Any privately operated forensic science laboratory that performs any DNA analysis, for the purposes of this Chapter, pursuant to a contract with the State, must comply with the quality assurance standards developed in accordance with subsection (1) and any other requirements, such as confidentiality requirements, specified by the National Commissioner or his or her delegate.

(4) Any person who—

(a) contravenes any confidentiality requirements, as contemplated in subsection (3); or

(b) uses or communicates any information obtained as a result of any DNA analysis performed pursuant to a contract with the State, in a manner that is not envisaged in such a contract, is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 15 years.'

⁹¹ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15O**. '(1) (a) Subject to paragraph (c), any bodily substance or intimate sample or non-intimate sample used to populate the NDDSA with DNA profiles may, if scientifically possible, be retained after it has fulfilled the purposes for which it was taken or analysed.

(b) The National Commissioner or his or her delegate must ensure the safe storage of such retained samples and must develop guidelines for the safe storage and destruction, where applicable, of retained samples.

investigations, the communication of information to unauthorised persons, and the access of the database by unauthorised persons.⁹² The last three sections assign the National Commissioner the responsibility of the training of the relevant personnel with the skills required for the effective operation of the technique of DNA analysis⁹³ and order a report to be submitted to the Minister every year on the operations of the NDDSA.⁹⁴

Clauses 7 to 10 make amendments to the Firearms Control Act of 2000.⁹⁵ Clause 7 adds the relevant definitions (as in Clause 2) to the existing Act. Section 113 of the Act is then amended to include the broader definition of body prints, allow speculative searches and allow the retention of samples unless the person has not been convicted in which case the samples are instructed to be

(c) An authorised person may at any time destroy any of the stored bodily substances or intimate samples or non-intimate samples, in accordance with the guidelines set out in paragraph (b), if such samples are no longer suitable or required for the purposes of forensic DNA analysis.

(d) A register must be kept, by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any stored bodily substances or intimate samples or non-intimate samples destroyed in accordance with paragraph (c), and such register must be submitted to the Minister and the National Commissioner on a monthly basis.

(2) (a) Subject to paragraph (b), no DNA profile loaded onto the NDDSA may be destroyed.

(b) Nothing in subparagraph (a) prohibits the updating of any DNA profile at a later stage, which may include the substitution of a DNA profile with an updated profile.

(3) Any bodily substance, intimate sample, non-intimate sample, DNA profile or any information stored on or within or associated with the NDDSA may only be used in accordance with section 15L, or by an authorised person for purposes related to, the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution.

(4) Despite subsection (1)(a), any bodily substance or intimate sample or non-intimate sample shall be destroyed after five years, if the person is not convicted by a court of law.'

⁹² Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 6, Chapter **15P**. 'Any person who—

(a) accesses or uses the NDDSA, or who enables another person to access or use the NDDSA, for any purposes not related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution;

(b) intentionally communicates any information that is contained in the NDDSA or allows such information to be communicated, in circumstances not related to the administration of the NDDSA, or in contravention of sections 15L and 15M;

(c) intentionally communicates the information referred to in section 15L(1) to any person or institution other than those listed in section 15L(2);

(d) knowingly and without authorisation, obtains or uses any information stored on or in the NDDSA;

(e) apart from the National Commissioner, is not an "authorised person" for the purposes of this Chapter and who performs any function in terms of this Chapter that is reserved to only be performed by an authorised person; or

(f) intentionally or recklessly stores a DNA profile on the NDDSA, in circumstances not authorised under this Chapter, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.'

⁹³ s15Q

⁹⁴ s15R and s15S

⁹⁵ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 7 – 8. See Annexure A

destroyed after five years.⁹⁶ Similar amendments are made to the Explosives Act of 2003 in the final section of the Bill.

2.3 The processing of the Bill to date

Since its introduction into Parliament in 2009, the Bill was placed before a committee responsible for deliberating the Bill through discussions with various experts and stakeholders affected by the Bill.⁹⁷ Due to the desire to pass the Bill swiftly, an Ad Hoc Committee was formed⁹⁸ and this committee met eight times before the closing of Parliament in April 2009 for the national elections.⁹⁹ The intention was that the Bill would be finalised before the closing of Parliament.

⁹⁶ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 8 s113. ‘(1) Subject to subsection (3), any police official may without warrant take fingerprints, bodyprints, nonintimate samples and intimate samples of a person or a group of persons or may cause any such prints or samples to be taken, if—

- (a) there are reasonable grounds to suspect that that person or that one or more of the persons in that group has committed an offence punishable with imprisonment for a period of five years or longer in terms of this Act; and
- (b) there are reasonable grounds to believe that the prints or samples or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of the persons as a possible perpetrator of the offence.

(2) The person who has control over prints or samples taken in terms of this section—

- (a) may examine them for purposes of the investigation of the relevant offence or cause them to be so examined; and
- (b) may cause any prints, non-intimate samples, intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search.

(3) Intimate samples to be taken from the body of a person, may only be taken by a registered medical practitioner or a registered nurse.

(4) A police official may do such tests, or cause such tests to be done, as may be necessary to determine whether a person suspected of having handled or discharged a firearm has indeed handled or discharged a firearm.

(5) (a) The fingerprints, bodyprints, intimate samples or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Any person who uses or who allows the use of the fingerprints, bodyprints, intimate samples, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the circumstances set out in that paragraph, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(c) The fingerprints and body-prints referred to in paragraph (a), must be stored by the Division: Criminal Record and Forensic Science Service of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act, 1995 (Act No. 68 of 1995).

(d) The intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act, 1995 (Act No. 68 of 1995).

(6) Despite subsection (5)(a), the fingerprints, bodyprints, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.’’.

⁹⁷ South African Parliament website,

http://www.parliament.gov.za/live/content.php?Item_ID=216&DocumentNumber=113992

⁹⁸ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 18 February – discussion of committee interim report

⁹⁹ Parliamentary Monitoring Group website, www.pmg.org.za

Although the members of the Ad Hoc Committee expressed their disappointment at not having done so, the considerations of the Bill were such that the Ad Hoc Committee felt that more time would be necessary to address these issues adequately.¹⁰⁰ Controversies around potential human rights violations, as well as logistical issues such as implementation strategies were felt to be too complicated to resolve in the time frame allocated.¹⁰¹ The report of the Ad Hoc Committee and the request for more time was adopted by the National Assembly. However, three members of the meeting expressed their disappointment in the failure of the Ad Hoc Committee to pass the legislation as they felt it was vital to the operation of an effective criminal justice system.¹⁰² These people were all members of political parties in opposition to the leading party (the African National Congress (ANC)), namely the African Christian Democratic Party, the Freedom Front Plus and the Democratic Alliance.

Since the reopening of Parliament in July 2009, the Parliamentary Portfolio Committee on Police has been delegated the task of overseeing the deliberations of the Bill.¹⁰³ Before the festive season, the Portfolio Committee had met ten times without a successful conclusion to the proceedings.¹⁰⁴ In an effort to implement at least part of the Bill, it was decided that it should be split, with the sections dealing with DNA analysis being left to be discussed at a later stage.¹⁰⁵ This decision was arrived at due to the feeling that the issues pertaining to DNA analysis required far more attention as there were numerous related controversies.¹⁰⁶ These controversies involve issues of human rights violations and implementation capabilities and will be elaborated on in Chapter 5. State Law Advisors were requested to re-draft the Bill to only include the sections pertaining to finger printing, body printing and photographing and the Ad Hoc Committee has proceeded to the stage of drafting their recommendations on this part of the Bill for consideration by the National Assembly.¹⁰⁷

¹⁰⁰ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 18 February 2009, supra note 99

¹⁰¹ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill Report, 23 March 2009

¹⁰² National Assembly meeting on 24 March 2009 in which was discussed the report of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill and the report of the Portfolio Committee on Justice and Constitutional Development on the Reform of Customary Law of Succession and Regulation of Related Matters Bill

¹⁰³ Parliamentary Monitory Group website, www.pmg.org.za

¹⁰⁴ Ibid

¹⁰⁵ Portfolio Committee of Police Meeting, 22 October 2009

¹⁰⁶ Ibid

¹⁰⁷ Parliamentary Monitory Group website, www.pmg.org.za

CHAPTER 3: FORENSIC EVIDENCE AND THE SCIENCE BEHIND THE PRINCIPLES

In order to gain a thorough grasp on the legislation and its potential impacts, it is necessary to have an understanding of the techniques referred to as 'forensic' science. The methods of print matching, DNA analysis and photography addressed in the Bill are referred to as 'real evidence' as they constitute physical or material evidence that can be presented in court.¹⁰⁸ The strength of this type of evidence for investigative purposes lies in what is called the 'Locard principle'.¹⁰⁹ Edmund Locard made the observation that every contact leaves a trace meaning that there will always be transference between two objects coming into contact.¹¹⁰ This observation forms the basis of most forensic techniques which function to identify these traces and link them to the relevant people, objects and locations.¹¹¹ The strength of real evidence in court lies in its physicality and scientific authentication.

3.1 Finger printing

The method of fingerprint matching is relatively well-known, as this method has been employed for means of identification since the early 1900s.¹¹² However, it has only been since the advent of computerised fingerprint identification systems that this technique has been used extensively for investigative purposes.¹¹³ Finger printing is useful for identification as it is assumed that every individual has unique fingerprint patterns - called 'ridge characteristics' - (no incidences of

¹⁰⁸ D van der Merwe 'Pointing out of crime scenes: A technique used to link a suspect with a crime' (2008) Masters Dissertation, University of South Africa

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² SA Cole 'Fingerprint identification and the criminal justice system: historical lessons for the DNA debate' in D Lazer (ed.), *DNA and the Criminal Justice System: The Technology of Justice* (2004), pp. 63-89.

¹¹³ Ibid

similarity have occurred),¹¹⁴ these patterns do not convey any personal information and obtaining fingerprint impressions is easy and painless. Originally, for investigative situations, prints had to be compared manually which means that crime scene prints in the form of bloody or 'latent' prints (invisible prints lifted using a dusting powder) were only really useful if there were suspects from whom prints could be taken for comparison.¹¹⁵ Comparison with a database of known prints took very long to complete and required analysis by trained experts.¹¹⁶ Today, fingerprints are used regularly in criminal investigations as digital systems have allowed massive reductions in turn around times and do not require extensive training for their operation.¹¹⁷

However, it should be noted that fingerprint evidence is not infallible and one of the major shortcomings of this technique is that no algorithms for the calculation of the chances of random matching have been developed.¹¹⁸ A match between two sets of prints is declared when a 'sufficient number of matching "ridge characteristics," both in terms of type and location',¹¹⁹ are identified.¹²⁰ In South Africa, the limited number of matches required is seven while most other jurisdictions require 8 – 22 matches.¹²¹ Yet fingerprint evidence is generally accepted in South African courts without regard as to the validity of the evidence.¹²²

3.2 Body printing

In a manner similar to that of finger printing, contact of any body part of an individual with a surface will leave a trace.¹²³ Thus, the principles of fingerprint identification have been applied to the analysis of prints from other parts of the body as well.¹²⁴ Latent prints of body parts such as toes, ears, noses and lips can be lifted using similar techniques to those used for finger printing and these can then be compared with the prints obtained from a suspect to either eliminate their involvement or strengthen the case against them, or with a set of prints contained in a database in

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ R Epstein 'Fingerprints meet *Daubert*: The myth of fingerprint "science" is revealed' (2001-2002) 75 *Southern California Law Review* 605

¹¹⁷ Cole (note 112)

¹¹⁸ L Meintjes-van der Walt 'Fingerprint evidence: probing myth and reality' (2006) 19 *South African Journal of Criminal Justice*

¹¹⁹ R Epstein (note 116)

¹²⁰ Ridge characteristics are grouped according to shape into the categories of whorls, loops and arches. For a match to be declared, these ridge characteristics need to be identical and need to be located in the same position on the finger for a match to be declared.

¹²¹ L Meintjes-van der Walt (note 118)

¹²² Ibid

¹²³ TP Kelliher *et al.* 'Identification: Prints, Finger and Palm' in *Encyclopedia of Forensic and Legal Medicine* (2005)

¹²⁴ Ibid

an attempt to identify a perpetrator.¹²⁵ The technique of comparing body-prints is more complicated than fingerprints, as both the uniqueness and stability of these body parts and their prints are still being investigated.¹²⁶ Despite this, the technique is valuable in investigations and has been useful for the solution of a number of cases.¹²⁷

3.3 DNA profiling

The mechanisms of DNA analysis are more obscure, possibly due to the field specific nature of this technique.¹²⁸ However, for the purposes of the understanding of the implications of the DNA analysis technique in criminal investigations, a thorough understanding of the concepts behind the procedure is required.

DNA is the chemical deoxyribonucleic acid found in just about every cell in the body and functions to carry the instructions for all the operations of a living cell.¹²⁹ These 'instructions are 'spelled out' by the sequence in which the four nucleotides making up DNA (adenine, guanine, thymine and cytosine or A, G, T and C) occur and this sequence will be identical in every cell of an individual.¹³⁰ This sequence is called the DNA code and sections of the sequence instructing a single operation are called genes which are grouped into chromosomes.¹³¹ Chromosomes are inherited from our parents, 23 from our mother and 23 from our father, and these group together in pairs in the cell.¹³² The molecular mechanisms of sexual reproduction ensure that every person will inherit a unique DNA code,¹³³ with the exception of identical twins who share the exact same DNA.¹³⁴ On the whole human DNA is relatively standard, as 99.99% of our genome (our entire DNA sequence) is necessary for making us human but the 0.01% of the genome that is variable is

¹²⁵ Ibid

¹²⁶ L Meijerman *et al.* 'Exploratory study on classification and individualization of earprints' (2004) *Forensic Science International* 140

¹²⁷ Ibid

¹²⁸ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51

¹²⁹ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹³⁰ Ibid

¹³¹ D Voet and JG Voet *Biochemistry* (2003)

¹³² V Lynch and C Hancock 'DNA: The 21st Century Detective' (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹³³ Voet (note 131)

¹³⁴ L Meintjes-van der Walt (note 129)

enough to ensure that every person is unique.¹³⁵ The presence of DNA in just about every living cell, the uniqueness of the DNA code between individuals and the inability for DNA to be changed are the characteristics that makes DNA suitable for the purposes of identification.¹³⁶

Although forensic DNA profiling has only been in use for a couple of decades, it has seen some significant progressions in that time. The current technique used in forensic profiling analyses part of the DNA called short tandem repeats (STRs).¹³⁷ STRs are segments of DNA that contain repeating sequences of two to seven DNA base pairs with the number of repeats varying significantly between individuals.¹³⁸ To illustrate this, one can imagine an STR consisting of the sequence GAC repeated 20 times at a particular locus (position) on a chromosome in one individual but five times at the same locus in another individual. Forensic profiling simply picks out a number of loci on the human genome known to consist of these STRs and counts how many repeats occur for an individual.¹³⁹ This technique has been selected due to its sensitivity, its highly discriminative power and its ability to resolve simple mixtures.¹⁴⁰ Different jurisdictions may specify different loci and the number of loci vary from 8-13, with more loci increasing the accuracy of a match.¹⁴¹ In South Africa, ten loci are analysed and compared.¹⁴² A DNA profile therefore consists of a list of numbers which only indicate how many STRs are found at particular loci in a particular individual's DNA.¹⁴³

A summary of the methodology of the generation of an STR profile is given below (more detailed descriptions are available).¹⁴⁴ The first step involves subjecting the collected DNA sample to a process called the Polymerase Chain Reaction (PCR) which selects the STRs of choice and makes millions of copies of these specific sequences of DNA.¹⁴⁵ These amplified STRs are then run through a slab of gel by an electric current (gel electrophoresis) and this will result in the

¹³⁵ Lynch and Hancock (note 132)

¹³⁶ Ibid

¹³⁷ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹³⁸ D Voet and JG Voet *Biochemistry* (2003)

¹³⁹ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹⁴⁰ MA Jobling and P Gill 'Encoded evidence: DNA in forensic analysis' (2004) *Nature Reviews: Genetics* 5

¹⁴¹ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹⁴² Ibid

¹⁴³ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹⁴⁴ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹⁴⁵ Ibid

separation of the strands of DNA according to their size.¹⁴⁶ Fluorescent tags are incorporated in the STRs during PCR and a laser light reveals these tags so that the type of STR can be correlated with its size during gel electrophoresis.¹⁴⁷ This information is converted into a digital profile as a list of numbers and this is what is used for comparison.¹⁴⁸

Due to the high variability of STRs between individuals and the number of loci analysed, the profile generated for an individual will be very specific. The probability of another person having the same profile are minimal.¹⁴⁹ It is possible to estimate the chances of two random individuals having the same profiles and when a match is found in a criminal case, the next step of the analysis process is to verify the match using these statistics.¹⁵⁰ These statistics are presented together with the profile match in court as a measure to prevent incorrect results.¹⁵¹

In addition to high individual variability, another important feature of STRs that make them useful for DNA analysis is that they are part of what is called 'non-coding' DNA or, informally, 'junk DNA'. Non-coding DNA does not code for any genes.¹⁵² Some of this DNA aids in the expression of genes but the STRs chosen for forensic profiling have no known genetic function.¹⁵³ The marker for gender is analysed and forms part of the profile but aside from this, no personal information can be construed from a DNA profile.¹⁵⁴

At this point, it is necessary to make mention of the DNA sample from which a DNA profile is generated. A DNA sample is the biological material collected from the individual and this contains the full genetic sequence of the individual.¹⁵⁵ Although the method of profiling utilised for forensic purposes does not result in the conveyance of any personal information, other scientific

¹⁴⁶ Ibid

¹⁴⁷ Ibid

¹⁴⁸ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹⁴⁹ Ibid

¹⁵⁰ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹⁵¹ Ibid

¹⁵² V Lynch and C Hancock 'DNA: The 21st Century Detective' (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ Ibid

processes and techniques can be conducted on these types of samples in order to reveal personal characteristics.¹⁵⁶

The extent to which DNA profiling could contribute towards the successful solution of a case is increasing with technological advances.¹⁵⁷ As DNA is present in most of our cells (the exception being red blood cells¹⁵⁸), it would be nearly impossible to avoid leaving DNA evidence at a crime scene and this is what makes the technique so powerful.¹⁵⁹ Previously, large quantities of DNA sample were required for analysis¹⁶⁰ but recent advances have permitted that only one nanogram (one billionth of a gram) of sample needs to be present in order to obtain a profile.¹⁶¹ However, there are still a number of factors that need to be considered to maximise the utilisation of this technique. Methods of sample collection and storage are important for the maintenance of sample integrity which is vital for the generation of an adequate profile.¹⁶² A high quality sample should contain only one source, be of sufficient quantity, be delivered for analysis as soon as possible, be stored at the correct temperature in the correct chemicals and should not be exposed to any sources of contamination or degradation.¹⁶³

The concepts behind the techniques are foreign to most non-scientists and this sometimes causes confusion. This is unfortunate as an understanding of these concepts could avoid arguments about the implications of the method and could even eliminate mistakes in legislation, in the field and in the court room.¹⁶⁴ Having established the principles behind the techniques of forensic science, the analysis of the debates around controversial issues will now be of more value.

¹⁵⁶ D Nelkin and L Andrews 'DNA identification and surveillance creep' (1999) 21 *Sociology of Health and Illness* 689

¹⁵⁷ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51

¹⁵⁸ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹⁵⁹ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹⁶⁰ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹⁶¹ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹⁶² L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

¹⁶³ Ibid

As a biological molecule, DNA is sensitive to a number of conditions and can only exist as a functional molecule under specific parameters. Exposure to Ultra Violet rays, microorganisms, certain enzymes and chemicals such as acids or alkalis can cause the DNA molecule to become unstable. Non-sterile reagents or working conditions are a major source of DNA degradation. D Voet and JG Voet *Biochemistry* (2003)

¹⁶⁴ PJ Neufeld and N Colman 'When science takes the witness stand' (1990) *Scientific American*

CHAPTER 4: INTERNATIONAL DEBATES AROUND FORENSIC LEGISLATION

Many of the issues being contemplated in the South African debates over the forensic legislation have already been dealt with in other jurisdictions, as many countries already make use of forensic techniques and have legislation to govern these practices.¹⁶⁵ The United Kingdom (UK) and the United States of America (USA) are the world leaders in this regard¹⁶⁶ and evaluation of the rhetoric concerning the controversial topics encountered by these jurisdictions in relation to topics of forensic practices is of value in determining the relevance of the discussions being held in South Africa. Although much can be learnt from the outcomes of these debates in different countries, knowledge of the differences in circumstances governing these discussions needs to be maintained when examining them.

4.1 United Kingdom (UK)

The UK is generally regarded as the leading jurisdiction in the field of modern day forensic practices.¹⁶⁷ The credit given is largely due to the DNA database that is in operation in England

¹⁶⁵ P Johnson and R Williams 'DNA and crime investigation: Scotland and the "UK National DNA Database"' (2004) 10 *Scottish Journal of Criminal Justice Studies* 1

¹⁶⁶ PD Martin 'National DNA databases—practice and practicability. A forum for discussion' (2004) 1261 *International Congress Series* 1

¹⁶⁷ P Johnson and R Williams 'DNA and crime investigation: Scotland and the "UK National DNA Database"' (2004) 10 *Scottish Journal of Criminal Justice Studies* 1

and Wales and its efficacy in identifying perpetrators.¹⁶⁸ This database was the first official database of its kind (established in 1995) and is currently the largest in the world.¹⁶⁹ The hit rate expected from this database is over 50% and in 2004 it was reported that the Home Office estimated 50% of the detections made using the database leading to convictions and 25% of those convictions leading to custodial sentences.¹⁷⁰ The success of the forensic system with its main component being the DNA database has been largely due to the provisions made by the legislation governing these practices.¹⁷¹ The UK was the first to legally authorise a DNA database by amending existing legislation in 1994 and since then, this legislation has undergone many alterations and discussions.¹⁷² These are all of value to other countries intending to draft similar statutes. It is interesting to note that the issues first identified as being contentious when considering DNA evidence and database legislation are still being debated around the world.

The Police and Criminal Evidence Act of 1984¹⁷³ was the first UK legislation drafted which addressed the collection of DNA samples.¹⁷⁴ The provision for collecting DNA samples was an addition to existing legislation on the collection of fingerprints and the provision was that DNA samples could be collected from persons charged with a serious offence.¹⁷⁵ At this stage, the legitimacy of DNA evidence and its admissibility in court was being strongly contested on the basis of the reliability of the techniques in profiling the sample as well as the statistical analysis conducted on the results¹⁷⁶ but these were mostly rejected by the courts.

With the introduction of the polymerase chain reaction (PCR) into the molecular biology field in 1983, forensic scientists were develop increasingly effective DNA profiling techniques and this lead to the discovery of the short tandem repeat (STR) method in the early 1990s.¹⁷⁷ This new technique was established as being more reliable and scientifically sound than previous methods,

¹⁶⁸ Ibid

¹⁶⁹ R Williams and P Johnson ‘Wonderment and dread’: representations of DNA in ethical disputes about forensic DNA databases’ (2004) 23 *New Genetics and Society*

¹⁷⁰ CH Asplen ‘The application of DNA technology in England and Wales’ (2004) US Department of Justice <http://www.ncjrs.gov/pdffiles1/nij/grants/203971.pdf>

¹⁷¹ P Johnson and R Williams ‘DNA and crime investigation: Scotland and the “UK National DNA Database”’ (2004) 10 *Scottish Journal of Criminal Justice Studies* 1

¹⁷² D Carling ‘Less privacy please, we’re British: investigating crime with DNA in the U.K. and the U.S.’ (2008) 487 *Hastings International and Comparative Law Review* 487

¹⁷³ Available at <http://www.statutelaw.gov.uk>

¹⁷⁴ R Croxton ‘The National DNA Database’ (2006) 258 *Postnote* – Parliamentary Office of Science and Technology

¹⁷⁵ CH Asplen ‘The application of DNA technology in England and Wales’ (2003) National Criminal Justice 203970, *National Forensic DNA Study Report: Final Report*

¹⁷⁶ PJ Lincoln ‘Criticisms and concerns regarding DNA profiling’ (1997) 88 *Forensic Science International*

¹⁷⁷ Ibid

and DNA evidence started becoming more common place in courts since around 1994.¹⁷⁸ The acceptance of DNA evidence opened up new avenues for utilisation of the technique in the field and the concept of a DNA database was suddenly very attractive and possible¹⁷⁹. This led to an update of the 1984 legislation¹⁸⁰ in the form of the Criminal Justice and Public Order Act of 1994.¹⁸¹ The new Act made the following changes to the existing Act. A DNA database was authorised and the group of people liable for DNA sampling was enlarged¹⁸² to include anyone charged with a ‘recordable offence’¹⁸³ (offences that form part of a criminal record including most offences apart from traffic violations¹⁸⁴) in an effort to build up the database. A reclassification of the terms ‘non-intimate’ and ‘intimate’ was made where ‘non-intimate’ was described to include saliva and buccal swabs, and the destruction of samples from acquitted persons was ruled compulsory.¹⁸⁵

The justification offered for the passing of the legislation in light of the violation of various human rights was the improvement of the efficiency of the investigative capacity of the police through an expansion of the database.¹⁸⁶ A larger database can result in quicker crime solution, meaning that there will be a reduction in investigative resources utilised, possible higher conviction rates resulting in fewer court proceedings and the exoneration of innocent suspects.¹⁸⁷ Also, the findings that a small percentage of the criminal population commits a large proportion of the crime and that the likelihood that the crimes committed by a particular criminal will increase in severity throughout their criminal ‘career’ were all listed as justifications for the importance of a large database.¹⁸⁸ Thus, an effective database should aid in reducing crime and many believe that it may even deter crime.¹⁸⁹

¹⁷⁸ Ibid

¹⁷⁹ CH Asplen ‘The application of DNA technology in England and Wales’(2003) National Criminal Justice 203970, *National Forensic DNA Study Report: Final Report*

¹⁸⁰ Ibid

¹⁸¹ Criminal Justice and Public Order Act of 1994, Chapter 33, United Kingdom Available at <http://www.statutelaw.gov.uk>

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Annexure B, Briefing of Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill by the Deputy Minister of Justice and Constitutional Development, 20 January 2009

¹⁸⁵ CH Asplen ‘The application of DNA technology in England and Wales’(2003) National Criminal Justice 203970, *National Forensic DNA Study Report: Final Report*

¹⁸⁶ P Johnson and R Williams ‘DNA and crime investigation: Scotland and the “UK National DNA Database”’ (2004) 10 *Scottish Journal of Criminal Justice Studies* 1

¹⁸⁷ V Lynch and C Hancock ‘DNA: The 21st Century Detective’ (2008) 5 *Criminal Justice Initiative Occasional Paper Series*

¹⁸⁸ Ibid

¹⁸⁹ Ibid

The change in the classification of ‘intimate’ and ‘non-intimate’ samples is a point of debate where the rights of the suspected person with respect to privacy, dignity and unreasonable search and seizure are considered. Not much has been documented about the conversations around this point in the UK and since it was decided that the types of samples classified as ‘non-intimate’ could be increased,¹⁹⁰ it can be assumed that there was no real contention on the grounds of the infringement of rights. The re-classification also meant that police were now able to obtain DNA samples without consent and that the police themselves could collect this sample.¹⁹¹ This extension of police powers and their access to DNA samples was not discussed as extensively as might be expected, except to say that it should assist in police investigations and reduce the costs of DNA profiling.¹⁹²

A more controversial topic has been the issue of the destruction of samples and this began to receive significant attention in the UK after the passing of the 1994 Act.¹⁹³ The Act stipulated the immediate destruction of samples collected from, and the profiles created of persons not convicted, with the retention of certain information from profiles authorised.¹⁹⁴ However, a number of cases occurred where samples were retained unlawfully and were subsequently involved in the identification of suspects.¹⁹⁵ The courts dealt with a number of cases where the admissibility of this evidence was debated and rulings went both ways due to judges having differing opinions on the matter.¹⁹⁶ A need for better administrative control over the database was becoming apparent and the Criminal Justice and Police Act (CJPA) was passed in 2001 to address this.¹⁹⁷ The direction taken by legislators in this Act was, according to Johnson and Williams,¹⁹⁸ interesting, as new legislation sought not to re-enforce the illegality of retaining profiles but sought rather to legitimate it.

¹⁹⁰ CH Asplen ‘The application of DNA technology in England and Wales’ (2003) National Criminal Justice 203970, *National Forensic DNA Study Report: Final Report*

¹⁹¹ P Johnson and R Williams ‘Genetics and forensics: Making the National DNA Database’ (2003) 16 *Science Studies*

¹⁹² R Croxton ‘The National DNA Database’ (2006) 258 *Postnote* – Parliamentary Office of Science and Technology

¹⁹³ CH Asplen ‘The application of DNA technology in England and Wales’ (2003) National Criminal Justice 203970, *National Forensic DNA Study Report: Final Report*

¹⁹⁴ *Ibid*

¹⁹⁵ Comments on the Criminal Justice and Police Act 2001, Available at <http://www.opsi.gov.uk/acts/acts2001/en/01en16-c.htm>

¹⁹⁶ D Carling ‘Less privacy please, we’re British: investigating crime with DNA in the U.K. and the U.S.’ (2008) 487 *Hastings International and Comparative Law Review* 487

¹⁹⁷ CH Asplen ‘The application of DNA technology in England and Wales’ (2003) National Criminal Justice 203970, *National Forensic DNA Study Report: Final Report*

¹⁹⁸ P Johnson and R Williams ‘Genetics and forensics: Making the National DNA Database’ (2003) 16 *Science Studies*

The CIPA formed part of the DNA expansion programme which was set up in England and Wales in 2000.¹⁹⁹ This was an initiative set up by the Home Office with the intent of establishing a database of the 'entire active criminal population'.²⁰⁰ In order to achieve this, it functioned on a number of levels including funding, education and training of police officers, and the effectation of legislative changes to enable the expansion of the database.²⁰¹ The CPJA section dealing with fingerprinting and DNA samples was based largely on a consultation document drawn up by the Home Office in 1999 entitled 'Proposals for Revising Legislative Measures on Fingerprints, Footprints and DNA samples'. It was claimed that the comments submitted by the public concerning this document were supportive.²⁰² Since the proposal and the Act itself provided for the retention of DNA and fingerprint profiles and samples indefinitely, regardless of acquittal or conviction,²⁰³ it can be assumed that this decision did not provoke much contestation in the UK. This is an interesting observation as one might imagine that the retention of samples beyond the time period for which they are required to investigate crime would cause concern about the use of the information for purposes other than criminal investigation as well as the infringement of rights such as the right to privacy and the presumption of innocence.²⁰⁴

While the Act was passed without much apparent contestation on this point, the courts experienced a different situation three years later when, in August 2004, Mr S and Mr Michael Marper filed an application against the United Kingdom of Britain and Northern Ireland in the European Court for Human Rights (ECHR) under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.²⁰⁵ The complaint was that their fingerprint and DNA samples were retained after they were acquitted and that this infringed on their right to respect of their private lives.²⁰⁶ The ECHR finally made its ruling in 2008 where it found, controversially, that the privacy

¹⁹⁹ R Croxton 'The National DNA Database' (2006) 258 *Postnote* – Parliamentary Office of Science and Technology

²⁰⁰ *Ibid*

²⁰¹ C McCartney 'The DNA expansion programme and criminal investigation' (2006) 46 *British Journal of Criminology* 175

²⁰² Comments on the Criminal Justice and Police Act 2001, Available at <http://www.opsi.gov.uk/acts/acts2001/en/01en16-c.htm>, accessed 1 December 2009

²⁰³ *Ibid*

²⁰⁴ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51

²⁰⁵ *S and Marper v The United Kingdom* (2004) European Court of Human Rights 30562, 30566, unreported Judgement available at <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>, accessed 1 December 2009

²⁰⁶ *Ibid*

of the applicants had been violated through the retention of their fingerprints, DNA profiles and DNA samples.²⁰⁷

The ruling has caused much debate at many levels and a flurry of activity has ensued. While awaiting the outcome of the ruling on legislation, it was reported that the police were instructed to ignore the ruling by the court and to continue operating as usual.²⁰⁸ On the legislative level, the Home Office published a document entitled 'Keeping the right people on the DNA database: Science and Public Protection' in May 2009²⁰⁹ and invited public comment so that a version of this document could be presented for inclusion in the Police and Crime Bill later on in the year. The paper covered the 'retention, destruction and governance of DNA and fingerprints', suggesting the destruction of all samples following the creation of a profile and the retention of DNA profiles and fingerprints of arrested persons for six to twelve years depending on the seriousness of the offense.²¹⁰

The responses to the paper were interesting in that discourse around these issues was previously limited. The majority of the responses supported the destruction of samples and the retention of profiles of convicted offenders although the retention time was suggested to be adjusted according to the seriousness of the crime.²¹¹ However, respondents rejected the idea of the retention of information of acquitted arrestees.²¹² Other issues such as the discriminatory nature of the database, requests for early deletion of profiles, the governance of the database, the group of people from whom samples could be taken and the fate of volunteer samples were discussed.²¹³ Adjustments of the proposals made by the Home Office have been included in the Crime and Security Bill currently being debated in the UK parliament.²¹⁴ However, the public were generally unhappy with the response of the state to the ruling made by the ECtHR and many newspaper

²⁰⁷ *S and Marper v The United Kingdom* (2004) European Court of Human Rights 30562, 30566, unreported.

Judgement available at <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>, accessed 1 December 2009

²⁰⁸ D Mery 'Three months on, you *still* can't get off the DNA database' (2009) Policing. Available at http://www.theregister.co.uk/2009/03/02/dna_dbase_stalling/, accessed 1 December 2009

²⁰⁹ United Kingdom Home Office, Science and Public Protection. Available at <http://www.statewatch.org/news/2009/may/uk-ho-dna-consult.pdf>, accessed 1 December 2010

²¹⁰ Ibid

²¹¹ 'Keeping the right people on the DNA database: Science and Public Protection. Summary of Responses, public consultation 7 May – 7 August 2009' Home Office. Available at <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-2788.pdf>, accessed 1 December 2010

²¹² Ibid

²¹³ Ibid

²¹⁴ Crime and Security Bill 2009, Available at <http://www.publications.parliament.uk/pa/cm200910/cmbills/003/10003.i-ii.html>, accessed January 2010

articles reported on the delayed reaction of the state and the injustice of the retention of profiles of innocent people.²¹⁵

Following the 2001 Act, the only other legislation passed in the UK regarding forensic procedures was the 2003 Criminal Justice Act.²¹⁶ The provisions of this Act allow the taking of fingerprints and non-intimate samples from any person arrested for a recordable offense.²¹⁷ This is more inclusive than the previous Act which only provided for collection from convicted offenders of recordable offenses. It is interesting that this statute has not come under fire in the recent deliberations around the invasion of privacy following the *S & Marper* case.²¹⁸ The 2009 proposal drawn up by the Home Office even mentioned that the criteria for collection of DNA and fingerprint samples was appropriate and would not be altered.²¹⁹ However, the respondents did suggest the specification of the offenses which qualify for DNA collection and these should be more limited than the 'recordable offenses' listed at present.²²⁰ Despite this, the Crime and Security Bill of 2009²²¹ widens the scope for collection of evidence as it provides for the collection of DNA and fingerprint samples from anyone arrested for or 'accused of' a recordable offense even if they are not in police custody as well as from people with past convictions.²²² The Bill has only been through the first reading in the UK parliament and there are still many steps before the passing of the Bill is finalised.²²³

Of particular interest with regards to the Crime and Security Bill as well as the current debates of importance in the UK at the moment, is the report compiled by the Human Rights Commission in November 2009.²²⁴ It addressed many of the topics already discussed in this chapter but it brought to light some new points. The legislative as well as practical management of the NDNAD was

²¹⁵ A Travis 'Police told to ignore human rights ruling over DNA database' (7 August 2009) The Guardian. Available at www.guardian.co.uk, accessed on 1 December 2009

²¹⁶ Criminal Justice Act of 2003, Chapter 44, United Kingdom, Available at <http://www.statutelaw.gov.uk>

²¹⁷ C McCartney 'The DNA expansion programme and criminal investigation' (2006) 46 *British Journal of Criminology*

²¹⁸ *S and Marper v The United Kingdom* (2004) European Court of Human Rights 30562, 30566, unreported. Judgement available at <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>, accessed 1 December 2009

²¹⁹ 'Keeping the right people on the DNA database: Science and Public Protection.' Home Office. Available at , <http://www.statewatch.org/news/2009/may/uk-ho-dna-consult.pdf>, accessed 1 December 2009

²²⁰ 'Keeping the right people on the DNA database: Science and Public Protection. Summary of Responses, public consultation 7 May – 7 August 2009' Home Office. Available at

<http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-2788.pdf>, accessed 1 December 2009

²²¹ Available at <http://www.publications.parliament.uk/pa/cm200910/cmbills/003/10003.i-ii.html>, accessed January 2010

²²² Crime and security Bill of 2009, Available at

<http://www.publications.parliament.uk/pa/cm200910/cmbills/003/10003.i-ii.html>, accessed January 2010

²²³ <http://services.parliament.uk/bills/2009-10/crimeandsecurity.html>

²²⁴ 'Nothing to hide, nothing to fear?' Human Genetics Commission, November 2009. Available at <http://www.hgc.gov.uk/Client/document.asp?DocId=226&CAteoryId=8>, accessed 1 December 2009

reported to be insubstantial and requiring attention, the reality of the discriminatory nature of the database was identified for amendment and the prospect of an international database was suggested to be thought about more carefully.²²⁵ A particularly controversial remark published in the report was that the success of the database was yet to be proven and some public reports have reiterated this.²²⁶ This is surprising as the NDNAD and DNA databases in general have been lauded for their crime fighting prowess.

While it is interesting that these conversations are only being had now, almost 15 years since the creation of the NDNAD, more advanced topics are being considered at the same time. The NDNAD has been used to make links between family members of suspects in the hope of solving crimes and this has been successful in a number of cases.²²⁷ This had propelled the privacy debate to another level due to the use of 'personal' information for the solving of 'unrelated' crimes. In other words, surveillance is extended from the individual to the family.²²⁸ Although there is no legislation governing this practice, the controversy around this issue indicates that it is very possible that some attention should be paid to it legislatively.²²⁹

4.2 Europe

While it would be impossible to address the legislative debates around forensic procedures in every country of Europe, some countries have experienced (or are currently experiencing) situations similar to that of the South African situation. In general, the major issues outlined in the UK context were considered by most of the European countries drafting or implementing forensic legislation, although the statutes vary considerably between the countries.²³⁰ Summaries of the different legislations and DNA databases are available, particularly with reference to the requirements for sample collection, retention and destruction.²³¹

Some European countries are in the process of drafting the relevant legislation and the controversies being discussed in these countries are of relevance. Greece passed its form of DNA

²²⁵ Ibid, at 4-8

²²⁶ Ibid, at 4-8

²²⁷ M Seringhaus 'The evolution of DNA databases: expansion, familial search and the need for reform' PhD dissertation, Yale Law School

²²⁸ FR Bieber, *et al.* 'Finding criminals through DNA of their relatives' (2006) 312 *Science*

²²⁹ M Seringhaus 'The evolution of DNA databases: expansion, familial search and the need for reform' PhD dissertation, Yale Law School

²³⁰ PD Martin *et al.* 'A brief history of the formation of DNA databases in forensic science within Europe' (2001) 119 *Forensic Science International* 225

²³¹ C Asplen 'ENFSI Survey on the DNA profile inclusion, removal and retention of member states' forensic DNA databases' (2009) Available at <http://www.enfsi.eu/page.php?uid=98>

database legislation in early 2009 despite resistance from opposition parties as well as the Athens Bar Association.²³² More controversially, the Italian legislation on forensic procedures passed in June 2009 has been heavily criticised for its poor quality. Inadequate safeguards, insufficient detail on the chain of custody of evidence, poor security provisions and poor management instructions were identified.²³³ The European Digital Rights organisation also brought up issues of privacy, misuse of information as well as the discriminatory potential of a DNA database.²³⁴ Croatia and Estonia are in the process of discussing and approving the appropriate legislation while Ireland has yet to draft formal legislation.²³⁵

European countries have an additional consideration when drafting forensic legislation as they have to submit to and align with European Union (EU) law.²³⁶ The EU was formed in an effort to maximise international cooperation within Europe.²³⁷ Initiatives have focussed on achieving uniformity between countries and promoting cross-border relations.²³⁸ The field of forensic practices has been a feature of this EU vision and efforts towards allowing cross-border sharing of information have included the standardisation of techniques, procedures and legislation.²³⁹ The European DNA Profiling Group and the European Network of Forensic Science Institutes are two examples of organisations established to implement this.²⁴⁰ More formally, the Prüm Convention²⁴¹ drawn up in 2005 and signatory by Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria facilitates the sharing of forensic information between the signed countries.²⁴² Thus, it sets a standard for the development of DNA databases and encourages proficient management and legal protection of the information on the databases.²⁴³ Germany and Austria led the world in the sharing of personal information across borders by

²³² J Belczyk 'Greece lawmakers approve DNA database and surveillance camera law' Available at <http://jurist.law.pitt.edu/paperchase/2009/07/greece-lawmakers-approve-dna-database.php>, accessed on 7 December 2009

²³³ A Monti 'Italian DNA database: The devil is in the details' Available at <http://www.edri.org/edri-gram/number7.16/dna-database-italy>, accessed on 7 December 2009

²³⁴ European Digital Rights 'Italian officials prepare the law for a DNA database' Available at accessed on 7 December 2009

²³⁵ C Asplen 'ENFSI Survey on the DNA profile inclusion, removal and retention of member states' forensic DNA databases' (2009) Available at accessed on 7 December 2009

²³⁶ PD Martin *et al.* 'A brief history of the formation of DNA databases in forensic science within Europe' (2001) 119 *Forensic Science International* 225

²³⁷ Ibid

²³⁸ Ibid

²³⁹ Ibid

²⁴⁰ P Johnson and R Williams 'DNA and crime investigation: Scotland and the 'UK National DNA Database'' (2004) *Scottish Journal of Criminal Justice Studies* (10)

²⁴¹ Prüm Convention (2005) The Council of European Unions

²⁴² JB Jacobs and D Blitsa 'Major "minor" progress under the third pillar: EU institution building in the sharing of criminal record information' (2008) 111 *Chicago-Kent Journal of International and Comparative Law*

²⁴³ Prüm Convention (2005) The Council of European Unions

entering an agreement even before the compilation of the Prüm Convention.²⁴⁴ The Convention encouraged ratification, acceptance or approval by other EU countries and a few additional countries have done so or have announced their intention to do so.²⁴⁵ The Convention has recently been incorporated in EU law²⁴⁶ and states are now required to draw up legislation accordance with this Convention.

4.3 United States of America (USA)

Although the USA and the UK are considered the top jurisdictions in the field of forensic science the approaches to the utilisation, regulation and management of these practices differ considerably between these countries.²⁴⁷ In the USA, debates around issues of privacy and personal autonomy have accompanied every legislated expansion of the DNA database together with related provisions while privacy debates have only recently come into consideration in the UK.²⁴⁸ A reason for this is offered by Carling in his hypothesis about the understanding of privacy.²⁴⁹ He suggested that the American focus on privacy is due to the focus on the Bill of Rights in the US Constitution.²⁵⁰ In particular, he identifies the Fourth Amendment of the US Constitution,²⁵¹ which prohibits unreasonable searches and seizures, as being especially influential.²⁵² Evidence of this pre-occupation with privacy is the manner in which the USA has approached the DNA programme and their lack of aggression here, especially in comparison with the UK.²⁵³

Legislatively, individual states are responsible for establishing their methods of governance and, thus provisions regarding forensic procedures vary between states.²⁵⁴ All 50 American states have

²⁴⁴ PD Martin *et al.* 'A brief history of the formation of DNA databases in forensic science within Europe' (2001) 119 *Forensic Science International* 225

²⁴⁵ JB Jacobs and D Blitsa 'Major "minor" progress under the third pillar: EU institution building in the sharing of criminal record information' (2008) 111 *Chicago-Kent Journal of International and Comparative Law*

²⁴⁶ *Ibid*

²⁴⁷ D Carling 'Less privacy please, we're British: investigating crime with DNA in the U.K. and the U.S.' (2008) 487 *Hastings International and Comparative Law Review* 487

²⁴⁸ DH Kaye 'Two fallacies about DNA data banks for law enforcement' (2001) *Brooklyn Law Review* 67

²⁴⁹ D Carling 'Less privacy please, we're British: investigating crime with DNA in the U.K. and the U.S.' (2008) 487 *Hastings International and Comparative Law Review* 487

²⁵⁰ *Ibid*

²⁵¹ The Fourth Amendment of the US Constitution forms part of the Bill of Rights and deals particularly with the right to freedom from unreasonable searches and seizures. US Constitution Amendment iv.

²⁵² D Carling 'Less privacy please, we're British: investigating crime with DNA in the U.K. and the U.S.' (2008) 487 *Hastings International and Comparative Law Review* 487

²⁵³ *Ibid*

²⁵⁴ JE McEwen and PR Reilly 'A review of state legislation on DNA forensic data banking' (1994) 54 *American Journal of Human Genetics* 941

passed legislation providing for the establishment of DNA databases.²⁵⁵ Federal legislation was passed to allow for the integration of all these databases together with a national DNA database to form the Combined DNA Identification System (CODIS) in 1998.²⁵⁶ Federal legislation requires states to comply with certain provisions to allow for participation in the CODIS system²⁵⁷ but conditions addressing entry, retention and destruction criteria, as well as the management and protection of the information vary considerably between states.²⁵⁸ Only eight of the 50 US states have authorised arrestee sampling²⁵⁹ and not all the states legislate indefinite retention periods.²⁶⁰ These points are illustrative of the less aggressive approach that the USA has taken to DNA analysis, although CODIS is still regarded as one of the leading forensic databases in the world. Other avenues of forensic expansion efforts are being explored and a particularly controversial topic in this regard is the extension or possible elimination of the Statute of Limitations.²⁶¹

The level of controversy experienced in the USA around issues of ethical violations through the utilisation of forensic techniques is evident in the court cases addressing this legislation.²⁶² As in the UK, the initial challenges were based on the reliability and admissibility of DNA evidence.²⁶³ Unlike in the UK this resulted in the introduction of a system of quality control in order to verify the reliability of the evidence.²⁶⁴ Laboratories now have to pass certain proficiency tests to be able to perform analyses for court purposes.²⁶⁵ Although DNA evidence is now well-established in courts, issues of privacy and personal autonomy have come to the fore and violations of the Fourth Amendment are often claimed.²⁶⁶ Expansion of the database needs constant justification from officials and supporters and, possibly for this reason, there is a strong emphasis on the usefulness of DNA evidence for the purposes of exonerating the innocent. The Innocence Project was founded in 1991, even before the establishment of CODIS, and has exonerated 245 innocent

²⁵⁵ D Carling 'Less privacy please, we're British: investigating crime with DNA in the U.K. and the U.S.' (2008) 487 *Hastings International and Comparative Law Review* 487

²⁵⁶ Ibid

²⁵⁷ P Haines 'Embracing the DNA fingerprint Act' (2007) *Journal on Telecommunications and High Technology Law* (5)

²⁵⁸ JD Biancamano 'Arresting DNA: The evolving nature of DNA collection statutes and their Fourth Amendment justifications' (2009) 70 *Ohio State Law Journal* 613

²⁵⁹ <http://www.dnaresource.com/documents/statequalifyingoffenses2009.pdf>

²⁶⁰ <http://www.dnaresource.com/documents/ArresteeDNA Laws-2009.pdf>

²⁶¹ M Seringhaus 'The evolution of DNA databases: expansion, familial search and the need for reform' PhD dissertation, Yale Law School

²⁶² EE Joh 'Essay: Reclaiming 'abandoned' DNA: The Fourth Amendment and genetic privacy' (2006) 100 *Northwestern University Law Review*

²⁶³ AP Stevens 'Arresting crime: Expanding the scope of DNA databases in America' (2001) 79 *Texas Law Review*

²⁶⁴ Ibid

²⁶⁵ Ibid

²⁶⁶ JD Biancamano 'Arresting DNA: The evolving nature of DNA collection statutes and their Fourth Amendment justifications' (2009) 70 *Ohio State Law Journal* 613

people to date using DNA evidence.²⁶⁷ The success of the Project is often focussed on in American discourse when advocating DNA profiling and DNA database expansion. This could be an effort to detract attention from the privacy issues associated with DNA profiling although it has raised additional issues such as the legality of post-conviction testing. The implications of The Innocence Project have extended further than promoting DNA profiling as it has brought to attention the inefficiency of the American criminal justice system.²⁶⁸

Other issues being grappled within the USA with regard to forensic practices include the tendency of databases to become dominated by a particular ethnic group or class.²⁶⁹ Also, fears that the future technology may take DNA profiling in directions which have additional possibilities of infringing of a number of rights have been voiced.²⁷⁰ Examples include the use of DNA samples information for purposes other than criminal investigation, such as predicting predispositions to diseases or behavioural patterns, the possibility that future research will discover genetic functions for the non-coding regions currently used for profiling, conveying personal information in currently non-informative profiles and the fear of a genetic database containing the profiles of every individual and the 'Big Brother',²⁷¹ potentials thereof.²⁷² Research is discovering new frontiers every day and the face of science changes constantly meaning that new scientific techniques are becoming available for forensic purposes all the time. Predicting phenotypical characteristics from DNA samples for criminal identification is one technique that has already been utilised and other similar options may become available in the near future.²⁷³

The sophistication of the forensic system and scientific technology in the USA has also meant that new topics of discussion constantly arise. One of these matters involves familial searching and this is under deliberation in the USA as much as it is in the UK, if not more so. Familial searching is the process whereby when conducting a DNA profile search and a perfect match is not found, a search for a 'partial' match is conducted. Since matches at 6 markers or more can indicate close relation, investigators use this information to identify possible family members of the suspect in

²⁶⁷ <http://www.innocenceproject.org/>, accessed 11 December 2009

²⁶⁸ AP Stevens 'Arresting crime: Expanding the scope of DNA databases in America' (2001) 79 *Texas Law Review*

²⁶⁹ D Lazer and MN Meyer 'DNA and the criminal justice system: Consensus and Debate' In: Lazer D, editor. *DNA and the Criminal Justice System: The Technology of Justice* (2004)

²⁷⁰ Ibid

²⁷¹ The term 'Big Brother' comes from the fictional work of George Orwell entitled 'Nineteen Eighty-Four'. In the story, 'Big Brother' was the name of the totalitarian dictator who kept his subjects under surveillance at all times. The term is now used as a synonym for the abuse of government power at the expense of civil liberties.

²⁷² Ibid

²⁷³ Ibid

order to aid the investigation.²⁷⁴ Familial searching has been used a few times in the US but only recently.²⁷⁵ Different states have different policies on familial searching but the Federal Bureau of Investigation (FBI) has not authorised it.²⁷⁶ The privacy concerns around this technique and its violation of the Fourth Amendment are deemed particularly worrying and attention has been called to the aggravation of racial bias in databases that is caused by familial searching.²⁷⁷ Familial searching does not actually fall foul of the law as the relevant jurisdictions do not specifically endorse or disallow them²⁷⁸ but the controversy around its use may cause the drafting of legislation which better governs the use of this technique.

4.4 International relations

Although this has been a fairly narrow analysis of international legislations, the jurisdictions analysed are the leaders in the field and they offer the most sophisticated and relevant material in terms of legal debate. Thus, the most significant topics of debate that are being addressed worldwide have been dealt with. A summary of these topics follows in the table (Table 1) and these will form the basis of the discussions following on the deliberations of the South African Criminal Law (Forensic Procedures) Amendment Bill.

Table 1: A summary of the major topics of debate around legislation governing forensic procedures

Issue	Concern
Criteria for inclusion on a database	Unnecessary testing, invasion of privacy, unreasonable search and seizure
Sampling procedure	Invasion of privacy, nature of procedure
Access to the profiles and samples	Potential for abuse, which parties should have access?, potential for future research to reveal personal information from this
Retention of samples/profiles	Presumption of innocence, information obtained

²⁷⁴ D Carling 'Less privacy please, we're British: investigating crime with DNA in the U.K. and the U.S.' (2008) 487 *Hastings International and Comparative Law Review* 496

²⁷⁵ M Seringhaus 'The evolution of DNA databases: expansion, familial search and the need for reform' PhD dissertation, Yale Law School

²⁷⁶ Ibid

²⁷⁷ Ibid

²⁷⁸ Ibid

	from samples
Destruction of samples/profiles	Probability of re-offending
Familial searching	Invasion of privacy
Genetic phenotyping	Invasion of privacy
Standardising of techniques for international sharing of information	Effective management of an international system

The latest development in the forensic science field having controversial implications is the potential for the establishment of an international database. Interpol have been directing the beginnings of an international database through a specialised DNA Unit.²⁷⁹ The programme allows member countries to contribute and have access to the database through the management of Interpol and according to their specifications and guidelines.²⁸⁰ The ethical considerations of this undertaking together with the implications this has on individual state legislation could lead to a new discourse with regard to international data sharing. As the operation is still in its initial stages, the intensity and direction of the conversations related to this topic is difficult to predict and it remains to be seen what the outcomes of this will be.

CHAPTER 5: THE SOUTH AFRICAN DEBATES AND CONTROVERSIES

The nature of the debates concerning the South African Criminal Law (Forensic Procedures) Amendment Bill differ somewhat from international situations as many of the controversies in other jurisdictions were only discovered after the passing of the legislation.²⁸¹ South Africa has had the advantage of having the knowledge of how these matters have played out internationally. Provision for these discussions to take place are made in the Parliamentary proceedings established

²⁷⁹ <http://www.interpol.int/Public/Forensic/dna/default.asp>, Accessed on 13 November 2009

²⁸⁰ Ibid

²⁸¹ PD Martin 'National DNA databases—practice and practicability. A forum for discussion' (2004) 1261 *International Congress Series* 1

for the passing of the Bill through the 'committee stage'.²⁸² This step involves the appointment of a committee to oversee the deliberation of the legislation through inviting the public to submit comments and suggestions about the bill, consulting relevant experts and stakeholders for input and advice and drafting any amendments deemed necessary.²⁸³ This version of the Bill is submitted to the National Assembly for further debate before approval and adoption.²⁸⁴ The committee stage of the processing of the Criminal Law (Forensic Procedures) Amendment Bill was intended to be straightforward and brief.²⁸⁵ Authorities felt that the need for the provisions made by the Bill was urgent and it was thought that this sentiment would be resonated by all involved.²⁸⁶ In general, this has been the case with the media, politicians and organisations such as The DNA Project and Business Against Crime, all expressing their support of the Bill.²⁸⁷ The public also responded very positively to the drafting of the Bill with most of the 108 submissions received by the Department and the Ad Hoc Committee simply expressing their support of the legislation.²⁸⁸ However, the approval of the Bill has proved more complicated than was originally predicted due to issues related to logistical as well as human rights matters.

5.1 The deliberations of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill

The desire for a quick resolution of the Bill was evident in the special approval granted for the Bill to be submitted to Parliament²⁸⁹ as well as the manner in which the operation of the committee was approached. An Ad Hoc committee was appointed and were given three months to deliberate and give recommendations on the Bill with the hope of passing the legislation before the closing of

²⁸² Report by the Joint Task Team on the Legislative Process in Parliament 'Reviewing the legislative process in Parliament' 13 November 2008, <http://www.pmg.org.za/node/14578>, accessed January 2009

²⁸³ Ibid

²⁸⁴ Report by the Joint Task Team on the Legislative Process in Parliament 'Reviewing the legislative process in Parliament' 13 November 2008, <http://www.pmg.org.za/node/14578>, accessed January 2009

²⁸⁵ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 18 February 2009 – discussion of committee interim report. Minutes available at www.pmg.org.za

²⁸⁶ Ibid

²⁸⁷ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

²⁸⁸ Ibid

²⁸⁹ Cabinet meeting 3 December 2008, <http://www.gcis.gov.za/newsroom/releases/cabstate/2008/081204.htm>

Parliament in March 2009.²⁹⁰ The first four meetings of the Ad Hoc Committee focussed on hearing input from all the necessary stakeholders on the provisions stipulated in the Bill. The Committee was briefed by the Deputy Minister of the Department of Justice and Constitutional Development (DoJ) (the Department responsible for the introduction and overseeing of the Bill),²⁹¹ as well as the Parliamentary Research Unit (PRU).²⁹² Submissions from the public were considered²⁹³ and the response of the DoJ to these contributions was heard.²⁹⁴ Despite the input from all these institutions, the Ad Hoc Committee did not reach agreement on every amendment and a finalised draft of the proposed amendments could not be presented to the National Assembly.²⁹⁵ Additionally, the Committee had felt it necessary for the SAPS to present them with an implementation plan and this had not been done, causing the Committee to request an extension of the committee stage of the proceedings.²⁹⁶ The debates and decisions of the Committee leading up to this point will now be discussed in detail with the topics of interest being separated into matters of either a logistical or human rights nature.

5.1.1 Human rights concerns

The requirement that legislation takes into account the necessary balances of human rights has been instrumental in the discussions around the Bill. Concerns about possible violations of human rights were indicated at various meetings and the Committee attempted to consider the different views presented by opposing schools of thought. The provisions under contention were the compulsory collection of fingerprints and non-intimate samples by police officials, the authorisation for fingerprint, body print and non-intimate sample collection from suspected persons, the indefinite retention period of samples and information unless otherwise stipulated, access to the NDDSA by authorised persons, inadequacies with regards to women's and children's rights, safeguards throughout the Bill, and the capacity for implementation.

²⁹⁰ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 18 February 2009 – discussion of committee interim report. Minutes available at www.pmg.org.za

²⁹¹ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 20 January 2009 – briefing by Deputy Minister of DoJ. Minutes available at www.pmg.org.za

²⁹² Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Minutes available at www.pmg.org.za

²⁹³ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

²⁹⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

²⁹⁵ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 18 February 2009 – discussion of committee interim report. Minutes available at www.pmg.org.za

²⁹⁶ National Assembly meeting on 24 March 2009 in which was discussed the report of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill and the report of the Portfolio Committee on Justice and Constitutional Development on the Reform of Customary Law of Succession and Regulation of Related Matters Bill

5.1.1.1 Arrestee sampling

Section 36A of the Bill provides for the compulsory collection of fingerprints and non-intimate samples from all arrested persons²⁹⁷ (called arrestee sampling). This provision is currently the most inclusive criteria for this provision in the world.²⁹⁸ A trend towards the incorporation of this provision is being seen worldwide and South Africa joins other countries like the UK and some American states in authorising arrestee sampling.²⁹⁹ However, arrestee sampling has been questioned on the grounds of privacy, human dignity and even the right to maintain silent upon arrest.³⁰⁰ In particular, the USA has seen cases challenging the provision on the grounds of a violation of the Fourth Amendment.³⁰¹ In consideration of the Bill, input from the PRU as well as public organisations such as the South African Human Rights Commission (SAHRC), the Cape Bar Council and the Council for Gender Equality (CGE) stated concerns about the capacity of this stipulation to violate rights to privacy and human dignity.³⁰² The SAHRC argued that non-intimate samples were an invasion of privacy due to the nature of the information that is conveyed by DNA.³⁰³ The CGE felt that arrestee sampling would result in the criminalisation of minor offences.³⁰⁴ To limit the violation of the right to privacy, the PRU³⁰⁵ and Cape Bar Council³⁰⁶ suggested that a clause be included whereby samples could only be taken if they were necessary for the investigation of a crime. The SAHRC and CGE suggested that the provision should deal only with persons arrested for serious offences (these needed to be listed).³⁰⁷

²⁹⁷ Criminal Law (Forensic Procedures) Amendment Bill B2-2009, Clause 2, s36A. See Annexure A

²⁹⁸ JD Biancamano 'Arresting DNA: The evolving nature of DNA collection statutes and their Fourth Amendment justifications' (2009) 70 *Ohio State Law Journal* 613

²⁹⁹ Ibid

³⁰⁰ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51

³⁰¹ JD Biancamano 'Arresting DNA: The evolving nature of DNA collection statutes and their Fourth Amendment justifications' (2009) 70 *Ohio State Law Journal* 613

³⁰² Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁰³ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

³⁰⁴ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁰⁵ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Minutes available at www.pmg.org.za

³⁰⁶ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁰⁷ Ibid

Counterarguments to this concern were voiced by The DNA Project and the DoJ in their explanations of the DNA analysis procedure.³⁰⁸ These illustrated that DNA profiles do not convey any information other than gender.³⁰⁹ The DoJ also emphasised the point that the objective of the Bill was to allow the expansion of the database.³¹⁰ Since a DNA profile would not be examined unless it came up as a result of a positive match with a crime scene profile, the sampling of all arrestees should not violate the privacy of any individual.³¹¹ The objective of expanding the NDDSA was supported by the following organisations: The DNA Project, the National Prosecuting Authority (NPA) and Business Against Crime (BAC).³¹² These submissions explained that DNA database expansion programmes have been executed in other countries for the purposes of improving the investigative capabilities of the police.³¹³ Statistics and practical experience have proved that having a bigger database relates to increased chances of getting a ‘hit’, or positive result.³¹⁴ The comparison of the successes of the UK database and the current database in South Africa was presented as an example of this with mention being made of the current hit rate in the UK being over 50% wherein South Africa, the chances of getting a hit are 0.02%.³¹⁵ BAC even suggested extending the criteria to include the fingerprints of any foreigners entering South Africa.³¹⁶

The rights of arrested persons were also debated with regard to this provision, with specific focus on the possibility of an infringement on the right to remain silent and not to be compelled to give self-incriminating evidence.³¹⁷ The NPA as well as the DoJ confirmed that fingerprints, body

³⁰⁸ Submission to Ad Hoc Committee by The DNA Project, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁰⁹ Ibid

³¹⁰ Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting 10 February 2009 - response to public submissions

³¹¹ Ibid

³¹² Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³¹³ PD Martin ‘National DNA databases—practice and practicability. A forum for discussion’ (2004) 1261 *International Congress Series* 1

³¹⁴ V Lynch and C Hancock ‘DNA: The 21st Century Detective’ (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

³¹⁵ Submission to Ad Hoc Committee by The DNA Project, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³¹⁶ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³¹⁷ Ibid

prints and DNA samples do not constitute incriminating evidence and they cited South African as well as international case law in support of this statement.³¹⁸

A final human rights concern regarding arrestee sampling was raised by the SAHRC in their questioning whether victims could be assured that the provision would be applied effectively in all situations and that no discrimination would be shown despite the expenses and inconvenience of the procedures.³¹⁹ This is an important consideration for the rights of victims as these will be infringed upon if the provision is not fulfilled equally. This concern relates to the capacity of the SAPS to implement the Bill adequately. This topic was an issue of priority for the Committee.³²⁰ The Committee called upon the SAPS to present them with a proposition for implementation³²¹ but this request was not fulfilled by the time the Committee had to submit its report.

The result of the debates pertaining to arrestee sampling was that the Committee felt that the provision was consistent with the intent of the Bill and that the balancing of rights was adequate.³²² No amendments to the provision were suggested.³²³ However, the implementation concerns related to this provision were still problematic and would need further consideration.

5.1.1.2 Methods of sample collection

Trepidations around the methods of sample collection and the empowerment of the police to perform this function, with particular reference to the collection of non-intimate samples, were voiced by the Cape Bar Council (CBC), the Law Society of South Africa (LSSA) and the CGE.³²⁴ The CGE expressed the view that a blood finger prick is intrusive and cannot be termed non-

³¹⁸ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³¹⁹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

³²⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

³²¹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³²² Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

³²³ Ibid

³²⁴ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

intimate as fluid is being drawn from the circulatory system and the chances of infection and contamination are the same as for 'intimate' samples.³²⁵ The CGE even listed a buccal swab as being intrusive as they were under the impression that this included vaginal swabs.³²⁶ The DoJ responded to these concerns by referring to international practices in this regard where blood finger pricks are considered acceptable as DNA samples.³²⁷ The DoJ also pointed out that the Bill clarified that buccal swabs only refer to the mouth and is particularly restrictive in this regard.³²⁸

The CBC and LSSA expressed misgivings about the role of police officials in the sample collection procedure.³²⁹ They referred to the potential violation of human dignity through non-intimate sample collection, especially blood finger-pricks.³³⁰ They felt that the skill levels and reliability of police officials to conduct these procedures were too limited.³³¹ The DoJ assured the Committee that the procedure of a blood finger-prick was not at all complicated, required little skill and could easily be trained.³³² Additionally, it was made clear that only those police officials having received this training would be allowed to conduct these procedures.³³³ The CBC and LSSA suggested that medical practitioners should rather be responsible for sample collection but the DoJ explained that this would be too time consuming and costly.³³⁴

The LSSA also commented that the taking of body prints by police officials was too intrusive and should rather be delegated to medical practitioners.³³⁵ The DoJ responded by pointing out that body prints were restricted to certain body parts, none of which were intrusive and all of which were common practice internationally.³³⁶ Again, the impracticalities of having medical practitioners perform these practices were given as an argument against this proposition together

³²⁵ Submission to Ad Hoc Committee by the Council for Gender Equality, 3 February 2009. Available at www.pmg.org.za

³²⁶ Ibid

³²⁷ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³²⁸ Ibid

³²⁹ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³³⁰ Ibid

³³¹ Ibid

³³² Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³³³ Ibid

³³⁴ Ibid

³³⁵ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³³⁶ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

with the fact that medical practitioners are not trained to take fingerprints or any other body prints.³³⁷

The Committee was satisfied with all of the responses presented by the DoJ and the result was that none of these provisions were amended by the Committee.³³⁸

5.1.1.3 Evidence retention period

The retention period for evidence was stipulated throughout the Bill as being indefinite for fingerprints, body prints, photographs, DNA samples and DNA profiles unless the person was not convicted by a court of law, in which case these had to be destroyed after five years.³³⁹ The human rights concerns related to this provision were similar to those associated with arrestee sampling and these two topics were often debated at the same time.

Apprehensions about the privacy violations inherent in this provision were debated right from the first meeting.³⁴⁰ The DoJ made mention of the ruling made by the European Court of Human Rights in this meeting.³⁴¹ The decision that the retention of the information of innocent people was a violation of their right to privacy was explained.³⁴² The Committee were uncomfortable with the provisions of the Bill in this regard but the Deputy Minister felt that the legislation was a necessary provision for the expansion of the database.³⁴³ The Deputy Minister felt that related matters of concern should be decided by the Constitutional Court.³⁴⁴ The time period of five years for the destruction of information of unconvicted individuals was queried by the Committee as to the appropriateness of the time frame and the provision itself, and more information about international practices was requested.³⁴⁵ The PRU gave a presentation on this topic at the next Ad Hoc Committee meeting, stating that England and Wales, together with 38 American states, allow for the indefinite retention of DNA samples and profiles.³⁴⁶ However, in the USA, unconvicted

³³⁷ Ibid

³³⁸ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

³³⁹ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 20 January 2009 – briefing by Deputy Minister of DoJ. Minutes available at www.pmg.org.za

³⁴⁰ Ibid

³⁴¹ Ibid

³⁴² Ibid

³⁴³ Ibid

³⁴⁴ Ibid

³⁴⁵ Ibid

³⁴⁶ 'Comparative Analysis' Annexure to Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

individuals could request expungement of their information.³⁴⁷ The rest of Europe and Canada did not allow indefinite retention of the information of innocent individuals.³⁴⁸ The PRU highlighted some of the concerns that needed to be addressed in relation to this issue and mentioned possible violations of human dignity and equality as well as privacy.³⁴⁹ The Committee seemed satisfied that South Africa was complying with international practice by authorising indefinite retention with the exception of unconvicted individuals.³⁵⁰

This matter was raised again in the public submissions by the SAHRC, the LSSA, the CGE and a Mr HH Gerber.³⁵¹ These generally focussed on the violation of the right to privacy as it was felt that innocent individuals should not have their profiles on the database unnecessarily.³⁵² The SAHRC also included that retention of the information of innocent individuals would compromise their right to be presumed innocent.³⁵³ The DoJ explained that suspected persons would still be presumed innocent until proven guilty despite the fact that a match of their profile to a crime scene sample had occurred.³⁵⁴ The CGE expressed their support of the proposed retention period while The DNA Project and BAC lobbied for an indefinite retention period, regardless of conviction status.³⁵⁵ The reasons given for this included the claim that some crimes take longer than five years to investigate and solve.³⁵⁶ Also, research has shown that the time taken for a previous criminal to show the same level of criminal tendencies as a law-abiding citizen is longer than five years.³⁵⁷ Also, new techniques for DNA analysis may be developed and retaining the samples for indefinite periods will allow the retesting of these samples with new technologies.³⁵⁸ Similar motivations

³⁴⁷ Ibid

³⁴⁸ Ibid

³⁴⁹ Ibid

³⁵⁰ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

³⁵¹ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁵² Ibid

³⁵³ Ibid

³⁵⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁵⁵ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁵⁶ Submission to Ad Hoc Committee by Business Against Crime, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁵⁷ Submission to Ad Hoc Committee by The DNA Project, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁵⁸ Ibid

were put forward by the DoJ in response to the concerns of this provision.³⁵⁹ However, through further discussions with SAPS,³⁶⁰ it was determined that retention of samples would be unnecessary, as the Bill allows for recollection of samples from individuals. Additionally, it was stated that sample retention would be troublesome due to storage capacity limitations.³⁶¹ The Committee considered these opinions, together with the importance of ensuring equal implementation. Despite a number of suggestions, including phased in approaches and time-limited provisions, they could not come up with an adequate amendment to provide for the requirements of the situation.³⁶²

A matter related to the retention of samples and profiles was brought up by the CGE in their observation that the Bill did not allow for volunteers to withdraw their consent to submit a non-intimate sample.³⁶³ The DoJ responded by saying that the situations described by the CGE where consent may have been given when under the influence of alcohol or under duress did not qualify as consent and would not affect the withdrawal of the 'consent'.³⁶⁴ For this reason, they felt that the criticism was unfounded and recommended that the provision remained the same. The Committee agreed with this opinion.³⁶⁵

5.1.1.4 Database management and safeguards against misuse of information

The possibility of the misuse of the information was a significant topic discussed by the Committee and it related to many provisions, including those already discussed. However, the major focus of this debate tended to centre on the rights of access to the database and the safeguards pertaining to this. Even in the first meeting, mention was made of the importance of drafting and successfully implementing safeguards to prevent abuse of the system³⁶⁶ and the PRU

³⁵⁹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁶⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

³⁶¹ Ibid

³⁶² Ibid

³⁶³ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁶⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁶⁵ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

³⁶⁶ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 20 January 2009 – briefing by Deputy Minister of DoJ. Minutes available at www.pmg.org.za

reiterated this in their presentation in the second meeting.³⁶⁷ The Committee were concerned about the possibility of abuse and questioned whether there had been such cases in other jurisdictions.³⁶⁸ The DNA Project and the DoJ reported that no cases of misuse of DNA database information had occurred and that the safeguards included in the Bill were sufficient for encouraging compliance with this principle.³⁶⁹ However, some of the submissions expressed unease about the adequacy of the safeguards in the Bill to prevent misuse of information.³⁷⁰ These were received from SAHRC and the South African Banking Risk Information Centre (SABRIC).³⁷¹ The DoJ responded by saying that the legislation is not the only mechanism in place to prevent misuse of information as physical and scientific limitations are in place or are being set up which prevent unauthorised persons having access to the database.³⁷²

The issue of access leads to questions about the outsourcing of responsibilities associated with the database and the Police and Prisons Civil Rights Union (POPCRU) submission³⁷³ was particularly relevant in these discussions. They stated that the Bill allowed for the outsourcing of the management of the database and this was cause for concern.³⁷⁴ While the DoJ assured the Committee that the Bill did not allow for this and that the NDDSA was placed entirely in the control of the SAPS Division: CRC and FSS, members were alerted to the necessity of defining the role that private forensic laboratories would play in the DNA analysis procedure.³⁷⁵ The SAPS mentioned that DNA analysis tasks would be outsourced in order to assist the SAPS laboratory with the large workload.³⁷⁶ The Committee members were unhappy about this.³⁷⁷ The debate on this point was quite lengthy with the Committee expressing deep concern about the potential for misuse of the information and the SAPS trying to assure the Committee that private laboratories

³⁶⁷ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

³⁶⁸ Ibid

³⁶⁹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

³⁷⁰ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁷¹ Ibid

³⁷² Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁷³ Submission to Ad Hoc Committee by POPCRU, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁷⁴ Ibid

³⁷⁵ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁷⁶ Ibid

³⁷⁷ Ibid

would only be utilised for the analysis of particular samples. The SAPS stated that private laboratories would have absolutely no access to the NDDSA or perform any speculative searches or statistical comparisons.³⁷⁸ The result of the debate in terms of the decisions of the Committee was that a request was made to the SAPS to present the plans of the Division: CRC and FSS on the outsourcing of DNA analysis and the roles that private laboratories are expected to play.³⁷⁹ As was mentioned before, the SAPS implementation plan was not presented to the Committee before the closing of Parliamentary session.

A final aspect of this debate pertains to the suggestions made by the SAHRC and the PRU for the establishment of an independent body responsible for the oversight of the management of the database. This body would include an ethics component to deal with matters of this nature.³⁸⁰ The SAHRC commented on the inadequate capabilities of the current establishment responsible for investigating misconduct within the SAPS, the Independent Complaints Directorate (ICD), to deal with this additional feature of the SAPS.³⁸¹ The DoJ and Committee approved of this suggestion although they felt that more thought needed to put into how the legislation would achieve this and proposed that the SAHRC should put together guidelines on how to go about setting this up.³⁸²

5.1.1.5 Children's rights

Inadequacies in providing for the rights of children were identified by BAC³⁸³ and the PRU.³⁸⁴ The particular provision questioned in this regard was Section 15J which deals with the conditions under which individuals can volunteer their DNA for inclusion on the NDDSA under a Volunteer Index.³⁸⁵ The PRU was unsatisfied with the degree to which children were catered for in the Bill as it was observed that, aside from phrases in Section 15J(1)(b) and Section 15J(6), no specific provisions were made for children.³⁸⁶ Therefore, children are treated in the same manner as adults in the Bill and the PRU found this problematic under the United Nations Convention on the Rights

³⁷⁸ Ibid

³⁷⁹ Ibid

³⁸⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁸¹ Ibid

³⁸² Ibid

³⁸³ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁸⁴ 'Summary of the Criminal Law (Forensic Procedures) Amendment Bill [B2-2009] and analysis of selected clauses' Annexure to Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

³⁸⁵ Ibid

³⁸⁶ Ibid

of the Child 1989 and the Child Justice Act of 2008.³⁸⁷ Even the two phrases granting children some leeway were questioned. Section 15J(1)(b) states that consent for the volunteering of the DNA of children can be given by a parent or guardian but the PRU questioned this in light of the fact that a parent or guardian may not have the child's best interests in mind.³⁸⁸ Section 15J(6) allows children to apply to have their profile removed from the NDDSA once they turn 18 and the PRU thought that this expungement should be automatic for children.³⁸⁹

The Committee did not deal directly with these provisions and these topics were not debated with the result being that no changes were made to these provisions.³⁹⁰

5.1.2 Logistical matters

Many of the logistical matters addressed by the Ad Hoc Committee relate to topics raising human rights concerns and a large degree of overlap between these issues is evident.

5.1.2.1 Arrestee sampling

The issue of capacity was a major point of discussion around the topic of arrestee sampling. The SAHRC commented on the increase in the workload that would occur with the passing of the Bill.³⁹¹ They questioned the capacity of the SAPS and the Forensic Science Laboratory (FSL) to deal with this, especially in light of the inefficiency of the SAPS and the severe backlog in the processing of samples at the FSL.³⁹² As was mentioned before, the SAHRC and the Cape Bar Council suggested collecting samples from certain groups, such as those arrested for serious offences, or only when the sample would assist in the solving of a crime.³⁹³ The DoJ responded that this would defeat the object of the Bill which was to populate the database.³⁹⁴ Furthermore, in other jurisdictions, collecting samples and fingerprints from persons arrested for minor offences sometimes allowed them to be identified for the perpetration of serious offences. The DoJ also felt

³⁸⁷ Ibid

³⁸⁸ Ibid

³⁸⁹ Ibid

³⁹⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

³⁹¹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

³⁹² Ibid

³⁹³ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

³⁹⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

that it would be too complicated for police officials to discriminate between serious and minor offences.³⁹⁵

The Committee acknowledged the issue of capacity within the SAPS from the very first meeting and the SAPS responded to these concerns by explaining the plans to outsource the DNA analysis of certain samples to private laboratories.³⁹⁶ The debates around this point and the privacy concerns associated with this have already been discussed although mention does need to be made about the concerns that the retrospectivity aspect of the Bill will negatively affect the SAPS efficiency due to the increased workload this will cause. This was one of the areas the SAPS identified as being outsourced to private laboratories in order to address this issue, as this was not a function that the SAPS usually performed.³⁹⁷ These implementation concerns did not affect the decision of the Committee to keep the provision for arrestee sampling but the presentation of an adequate implementation strategy by the SAPS was deemed essential as a safeguard in this respect before the Bill could be passed.³⁹⁸

5.1.2.2 Methods of sample collection

The main concern related to sample collection focussed on the qualifications of police officials to take non-intimate samples - in particular, blood finger pricks and buccal swabs.³⁹⁹ The PRU, LSSA and CBC questioned whether the taking of non-intimate samples could be entrusted to the police as they felt that police officials did not possess the appropriate skills and training to perform this procedure.⁴⁰⁰ This was worrying for the sake of the integrity of the samples and the dignity of the arrestee (as previously discussed). The LSSA and the CBC suggested that these samples should be taken by qualified health workers and the DoJ response to this suggestion has been detailed. Mr Gerber suggested that only officers of particular rank or qualification should be allowed to take non-intimate samples and the DoJ assured the Committee that this guideline has been set out in the SAPS crime scene policy, although they admitted that this fact could be

³⁹⁵ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

³⁹⁶ Ibid

³⁹⁷ Ibid

³⁹⁸ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

³⁹⁹ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁴⁰⁰ Ibid

clarified in the Bill.⁴⁰¹ The DoJ stated that collection procedures were not difficult to conduct and police officers would be trained in this skill with ease.⁴⁰² They also informed the Committee that further safeguards against contamination are in place such as the use of specialised collection kits which allow for easy sampling and adequate storage.⁴⁰³ Also, stipulations in the crime scene policy require efficient documentation and proof of the chain of custody with regards to any evidence.⁴⁰⁴ However, they approved the additional phrase suggested by SABRIC to be inserted in Section 36B(3) which provides for the re-taking of samples if negligence resulted in the loss of fingerprints.⁴⁰⁵

An additional concern of the provision ordering police officials to take fingerprints and non-intimate samples is the position of the police as interested parties in the investigation of crimes.⁴⁰⁶ Possibilities of corruption in the form of the intentional destruction or fabrication of evidence were pointed out by the LSSA, Cape Bar Council and SABRIC.⁴⁰⁷ Additional safeguards against the possibility of corruption were proposed by SABRIC as a solution to this issue and the Committee were supportive of this suggestion.⁴⁰⁸ A safeguard which criminalises falsification or fabrication of evidence was included in the proposed amendments and the Committee approved this.⁴⁰⁹ The suggestion of creating an independent oversight body to monitor the activities of forensic practices, particularly DNA related techniques by the SAHRC⁴¹⁰ would be useful for the supervision of these practices as well.

POPCRU expressed distrust of the legislation in the wording of provisions stating “police officials must... or must cause” as they felt this allowed for the outsourcing of the sample collection

⁴⁰¹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴⁰² Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴⁰³ Ibid

⁴⁰⁴ Ibid

⁴⁰⁵ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁴⁰⁶ SJ Walsh ‘Legal perceptions of forensic DNA profiling Part I: A review of the legal literature’ (2005) 155 *Forensic Science International* 51

⁴⁰⁷ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁴⁰⁸ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴⁰⁹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁴¹⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

procedures.⁴¹¹ The DoJ addressed this concern by referring to the use of this wording in existing legislation. They also guaranteed that this only refers to police officials and could not be interpreted as allowing for outsourcing.⁴¹²

It was decided by the Committee to retain the provision allowing for police officials to take fingerprints, body prints, photographs and non-intimate samples although amendments were made which clarified which persons would be authorised to take these samples.⁴¹³

The collection of intimate samples was also contentious and Section 37 of Clause 3 was criticised in its capacity to regulate the taking of these samples. The responsibilities of medical practitioners in the procedure were worrisome for the PRU as they felt that the provision placed too much responsibility in the hands of the medical practitioners.⁴¹⁴ This provision requires medical practitioners to exercise discretion in determining when to take intimate samples. The DoJ responded by stating that this section already existed in the CPA and current practices followed this regulation. No problems related to these concerns had been experienced until this point.⁴¹⁵

Other issues in relation to the methods of sample collection raised in submissions from the public will now be discussed briefly. The NPA felt that the definition of 'body prints' was too limited as body parts other than those listed in the Bill are often used in criminal investigations. They suggested broadening the definition by including the phrase '...any other body part'.⁴¹⁶ The Committee were happy to include a more detailed list of the body parts allowed to be printed in the definition of 'body prints' although they objected to defining it as 'any body part', as this could infringe on rights to privacy and human dignity.⁴¹⁷

⁴¹¹ Submission to Ad Hoc Committee by POPCRU, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴¹² Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴¹³ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁴¹⁴ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

⁴¹⁵ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴¹⁶ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁴¹⁷ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

The Cape Bar Council commented on the lack of provision for legal counsel to be present for the collection of non-intimate samples but the DoJ explained that existing legislation allows for the presence of legal counsel at any stage of criminal proceedings.⁴¹⁸ The DoJ felt that it was unnecessary to redefine this provision in the Bill.⁴¹⁹ The Committee agreed with the DoJ and no amendments were made.⁴²⁰

The SAHRC expressed the opinion that the Bill was not thorough on the instructions related to the procedure of taking non-intimate samples.⁴²¹ They suggested specifications of the tests to be utilised and the storage of samples and profiles.⁴²² The DoJ were happy with the level of detail relating to the specific tests that should be performed and how these were to be handled at the various stages of the procedure.⁴²³ The Committee agreed that the level of detail was acceptable and no amendments were made in this regard.⁴²⁴

The SAHRC questioned the admissibility of evidence despite non-compliance with procedural instructions as authorised in Clause 5, Section 225(2).⁴²⁵ The SAHRC felt that this provision is open to 'malicious interpretation'.⁴²⁶ The CGE expressed the opposite opinion.⁴²⁷ The DoJ explained that the admissibility of evidence had been allowed in courts in spite of methods of acquisition being contrary to regulation.⁴²⁸ The existence of Section 225 in the current CPA was also mentioned as support of this argument.⁴²⁹ The Committee was satisfied with this explanation and the phrase remained unaltered.⁴³⁰

⁴¹⁸ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴¹⁹ Ibid

⁴²⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁴²¹ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁴²² Ibid

⁴²³ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴²⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁴²⁵ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁴²⁶ Ibid

⁴²⁷ Ibid

⁴²⁸ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴²⁹ Ibid

⁴³⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

In relation to the same section, SABRIC suggested that a provision addressing the resistance of any person to submit to the taking of samples and prints, and the DoJ responded by stating that this was already addressed in existing legislation.⁴³¹ The final issue in relation to methods of forensic evidence collection was a request by BAC and the SAPS for the inclusion of a provision authorising and regulating the use of Morpho Touch⁴³² technology.⁴³³ This was subsequently added in to Section 15B(3) and describes the use of ‘biometric devices’⁴³⁴ for criminal intelligence purposes.⁴³⁵

5.1.2.3 Database management

The logistical matters related to the management of the criminal intelligence databases are essential for reasons concerning the misuse of the information stored on these databases and, thus, this topic received significant attention. Most of the mentioned submissions felt that the instructions related to the management of the database were inadequate and needed to be more detailed.⁴³⁶ In particular, the custodianship of the database being granted to the SAPS was questioned by the SAHRC⁴³⁷ and PRU.⁴³⁸ These stated a preference for the NDDSA to be under the authority of a body which is completely independent of the SAPS to avoid corruption and ensure a measure of objectivity in the process. POPCRU held the opposite view, stating that it is vital that the NDDSA remains solely in the charge of the SAPS as this is a state responsibility and should not be outsourced.⁴³⁹ If this happened, it would result in loss of skilled personnel from state structures to the private sector, compromising the ability of the state to perform their functions.⁴⁴⁰ POPCRU recommended that the Bill be more explicit in the delegation of authority to the SAPS,

⁴³¹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴³² The Morpho Touch is a handheld fingerprint scanner which is linked to the SAPS AFIS database. The device is used at roadblocks, borderposts and other police operations. South African Yearbook 02/03: Safety and Security 447

⁴³³ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁴³⁴ Biometrics can be defined as ‘any automatically measurable, robust and distinctive physical characteristic or personal trait that can be used to identify an individual or verify the claimed identity of an individual.’ JD Woodward *et al.* ‘Biometrics: A look at facial recognition’ RAND Documented Briefing (2003) 1
Biometric devices are devices that allow for the identification of these physical characteristics.

⁴³⁵ Ibid

⁴³⁶ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁴³⁷ Ibid

⁴³⁸ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

⁴³⁹ Submission to Ad Hoc Committee by POPCRU, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴⁴⁰ Ibid

particularly the Division: Criminal Record Centre and Forensic Science Services. The obscurity of the phrase ‘National Commissioner and his or her delegate’ was seen as being open to the interpretation that ‘his or her delegate’ could mean unauthorised persons and these could then have access to the database.⁴⁴¹ The DoJ responded by declaring that the management of the database is clearly delegated to the Division: CRC and FSS of the SAPS in the definition of ‘authorised person’ in Section 36A.⁴⁴² This is also achieved through the delegation of the development, implementation and maintenance of a personal identification services strategy in Section 15C(3)⁴⁴³ and Section 15F⁴⁴⁴ to this division. These provisions were regarded as being adequate to prevent outsourcing of this responsibility in any way.⁴⁴⁵ The DoJ assured the Committee that ‘his or her delegate’ referred to personnel within the SAPS and could not include unauthorised persons.⁴⁴⁶ The SAPS felt comfortable with the removal of this phrase.⁴⁴⁷ However, they also stated that restricting the access to the database too severely could be impractical for operational purposes.⁴⁴⁸ The Committee felt that no harm could be done by eliminating the phrase ‘his or her delegate’ and they included this in their amendments.⁴⁴⁹

⁴⁴¹ Ibid

⁴⁴² Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

Criminal Law (Forensic Procedures) Amendment Bill, s36A ‘(a) **‘authorised person’** means in reference to—
 (i) photographic images, fingerprints or body-prints, any police official in the performance of his or her official duties; or
 (ii) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate;’

⁴⁴³ Criminal Law (Forensic Procedures) Amendment Bill, s15C, ‘(3) The police official commanding the Division: Criminal Record and Forensic Science Services within the South African Police Service, is responsible for—
 (a) the development, implementation and maintenance of a personal identification services strategy, to give effect to the provisions of this Chapter and Chapter 5B; and
 (b) the development, implementation and maintenance of systems and processes, including the required information technology infrastructure and systems, to support such a strategy.’

⁴⁴⁴ Criminal Law (Forensic Procedures) Amendment Bill, s15F ‘(1) There is hereby established a national DNADatabase within the South African Police Service, to be known as the National DNA Database of South Africa (NDDSA).
 (2) The NDDSA, whether in computerised or other form, shall be administered and maintained by the National Commissioner or his or her delegate and shall be located within the Division: Criminal Record and Forensic Science Service.’

⁴⁴⁵ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

⁴⁴⁶ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴⁴⁷ Ibid

⁴⁴⁸ Ibid

⁴⁴⁹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

Other minor changes to sections of the Bill detailing the establishment, maintenance and administration of the database include the following. The Committee, on recommendation from the DoJ, felt it was necessary to include further provisions allowing for the use of fingerprint and DNA databases for identification of missing persons and unidentified human remains.⁴⁵⁰ Phrases related to this were included in the definition of a 'speculative search'.⁴⁵¹ The PRU raised questions about the sharing of database information with foreign law enforcement agencies as stipulated in Section 15M.⁴⁵² They stated that the authorities should be very careful about what information should be made accessible to particular agencies.⁴⁵³ However, the Committee was happy with this provision and no amendments were made here.⁴⁵⁴ Section 15N was also amended to include a time restriction on the compilation of National Instructions so as to ensure that these were constructed and approved timeously.⁴⁵⁵

5.1.2.4 Police training

The DNA Project, CGE, and the PRU all highlighted the importance of training the relevant persons for the implementation of the Bill adequately.⁴⁵⁶ The DNA Project gave comprehensive input on the type of training that would need to be instituted and how to go about achieving this.⁴⁵⁷ Details about the initiatives set up by the organisation were presented to the Committee, including information on the establishment of a post-graduate qualification in forensic biology and DNA awareness training for lower level police officials.⁴⁵⁸ The importance of the issue of providing sufficient training was reiterated by the Committee in the value placed on the presentation of a satisfactory implementation plan by the SAPS addressing this point.

5.1.3 The findings of the Ad Hoc Committee

⁴⁵⁰ Ibid

⁴⁵¹ Ibid

⁴⁵² 'Summary of the Criminal Law (Forensic Procedures) Amendment Bill [B2-2009] and analysis of selected clauses' Annexure to Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

⁴⁵³ Ibid

⁴⁵⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁴⁵⁵ Ibid

⁴⁵⁶ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁴⁵⁷ Submission to Ad Hoc Committee by The DNA Project, 3 February 2009. Available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁴⁵⁸ Ibid

The final two meetings of the Ad Hoc Committee focussed on the report which would be submitted to the National Assembly on their findings.⁴⁵⁹ Some discussion was held as to whether the Committee could have finalised the Bill for the National Assembly.⁴⁶⁰ Some members felt they had failed in their responsibility in not doing so, especially considering the general support the Bill had received from the public.⁴⁶¹ Comments made by Ms F Chohan-Kota (ANC) and Mr Delport (Democratic Alliance) stated that an implementation plan could be changed and that this should not have been a major concern of the Committee.⁴⁶² Most members held mixed feelings as they felt that it was important to pass the Bill as rapidly as possible although the time allocated in which to do so had been too short.⁴⁶³ The Bill had proved too controversial on issues of human rights violations and implementation capabilities and so, it was eventually decided that the report would express this view.⁴⁶⁴ The report explained the difficulties encountered by the Committee on issues of rights to privacy, the powers of police officials, the possible misuse of information, the concerns about the indefinite retention of evidence information and samples, the management of the NDDSA as well as the implementation difficulties foreseen.⁴⁶⁵

The National Assembly considered the report of the Committee and agreed to carry the deliberation of the Bill over to the next Parliamentary sitting.⁴⁶⁶

5.2 The deliberations of the Portfolio Committee on Police on the Bill

After the introduction of the new Parliament, the Bill was passed on to the Portfolio Committee on Police for deliberation. Since the Portfolio Committee constituted a membership vastly different from that of the Ad Hoc Committee, the proceedings of the committee stage had to be repeated so that all members could be sufficiently informed to make accurate decisions. Thus, the first two meetings involved briefings by the DoJ and the Parliamentary Research Unit which provided the

⁴⁵⁹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 18 February 2009 – interim report. Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 23 March 2009 – adoption of report. Minutes available at www.pmg.org.za

⁴⁶⁰ Ibid

⁴⁶¹ Ibid

⁴⁶² Ibid

⁴⁶³ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 23 March 2009 – adoption of report. Minutes available at www.pmg.org.za

⁴⁶⁴ Ibid

⁴⁶⁵ Report of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill for the National Assembly meeting on 24 March 2009. Minutes available at www.pmg.org.za

⁴⁶⁶ National Assembly meeting on 24 March 2009 in which was discussed the report of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill and the report of the Portfolio Committee on Justice and Constitutional Development on the Reform of Customary Law of Succession and Regulation of Related Matters Bill

Portfolio Committee with the background to the Bill and a description of the provisions contained in the Bill.⁴⁶⁷

Some controversies and problems were identified in these initial meetings⁴⁶⁸ but these were mostly similar to the issues debated by the Ad Hoc Committee. Topics discussed included the infringement of various human rights through provisions such as arrestee sampling, indefinite retention periods and the lack of specialised conditions for children.⁴⁶⁹ Practical matters included concerns around the increase in police powers, the adequacy of safeguards in the Bill, foreseen difficulties with implementation in relation to training requirements, the coordination of different departments, capacity issues and the costs that the implementation would incur.⁴⁷⁰ A new topic to find importance in the deliberations regarded the practicalities of accessing the Department of Home Affairs fingerprint database (HANIS) and it was felt that this needed to be explained to the Portfolio Committee.⁴⁷¹

The meetings that followed were distinctly focussed on either one of two topics: the implementation strategy and the finalisation of the legislation. The Portfolio Committee addressed the former by hearing presentations from the SAPS, DHA, Office for Criminal Justice System Reform (OCJSR) and the State Information Technology Agency (SITA) and the latter was addressed through deliberations with the DoJ, State Law Advisors and other relevant experts. The outcomes of these meetings did not result in a passing of the Bill and the discussions held reveal much about the reasons for the Portfolio Committees hesitation in finalising the legislation.

5.2.1 Deliberations of the legislation

After the initial informatory meetings, the Portfolio Committee decided that the best approach to the finalisation of the Bill would be to remove all the provisions referring to DNA analysis and the NDDSA, and deal with the rest of the Bill first.⁴⁷² Thus, all the following meetings, including the ones addressing the implementation of the Bill, dealt exclusively with finger printing, body printing and photographing. The logic behind this was that this section of the Bill could be finalised relatively easily as most of the controversies lay in the provisions dealing with DNA

⁴⁶⁷ Meeting of the Portfolio Committee of Police on 6 October – briefing by PRU. Meeting of the Portfolio Committee of Police on 7 Oct – briefing and implementation plan. Minutes available at www.pmg.org.za

⁴⁶⁸ Ibid

⁴⁶⁹ Ibid

⁴⁷⁰ Ibid

⁴⁷¹ Meeting of the Portfolio Committee of Police on 6 October 2009 – briefing by PRU. Minutes available at www.pmg.org.za

⁴⁷² Meeting of the Portfolio Committee of Police on 22 October 2009. Minutes available at www.pmg.org.za

evidence.⁴⁷³ It was felt that DNA analysis could continue being conducted as it has been done until now.⁴⁷⁴

5.2.1.1 The split Bill

A draft of the split Bill was compiled and included provisions for the taking of fingerprints, body prints and photographs by police officials.⁴⁷⁵ It allowed for the collection of non-intimate and intimate samples by medical practitioners.⁴⁷⁶ All references to children were deleted.⁴⁷⁷ The Bill would allow for the coordination with other departments including allowing SAPS access to the HANIS and eNATIS databases but no regulations regarding a DNA database were included.⁴⁷⁸ Clauses 1, 2, 3, 6, 7, 8, 9 and 10 would be amended accordingly.⁴⁷⁹ Clauses 4 and 5 dealing with the proof of certain fact by affidavit, and with evidence of prints or bodily appearance of accused persons respectively would revert back to their original forms.⁴⁸⁰ Issues raised in the first consideration in the new form of the Bill included the logistics around the sharing of information through cross-departmental database access, and the problems of a lack of communication between the relevant participators in the deliberation of the Bill.⁴⁸¹

The public was again asked to submit views and opinions on the Bill and these were dealt with through responses from the SAPS and the DoJ.⁴⁸² The submissions only considered the original draft of the Bill into consideration and of the criticisms were similar to those identified in the first round of public feedback. However, the responses to these submissions dealt only with those criticisms associated with the provisions in the new split Bill.⁴⁸³ It must be said that many of the submissions identifying issues with DNA analysis and NDDSA provisions had been addressed by the DoJ with the previous committee but the new submissions did raise some additional points of concern with regards to DNA procedures and these will be outlined briefly now.

⁴⁷³ Meeting of the Portfolio Committee of Police on 23 October 2009 – split bill. Minutes available at www.pmg.org.za

⁴⁷⁴ Ibid

⁴⁷⁵ Ibid

⁴⁷⁶ Draft of Criminal Law (Forensic Procedures) Amendment Bill after the decision to split the bill – discussed at the meeting of the Portfolio Committee of Police on 28 October 2009. Available at www.pmg.co.za

⁴⁷⁷ Ibid

⁴⁷⁸ Ibid

⁴⁷⁹ Ibid

⁴⁸⁰ Ibid

⁴⁸¹ Meeting of the Portfolio Committee of Police on 23 October 2009 – split bill. Minutes available at www.pmg.org.za

⁴⁸² Meeting of the Portfolio Committee of Police on 6 November 2009 – public hearings. Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁴⁸³ Ibid

5.2.1.2 New issues relating to DNA procedures but not discussed by the Portfolio Committee

The critique of the definition of ‘non-intimate’ and ‘intimate’ samples was addressed in additional submissions in the second round and these mirrored the issues debated by the Ad Hoc Committee.⁴⁸⁴ However, a further observation was made by an employee of the CSIR which identified the insufficiency of the definitions of ‘intimate’ and ‘non-intimate’ samples.⁴⁸⁵ These do not cover samples such as urine and semen.⁴⁸⁶ He suggested that the term ‘intimate’ should include all samples other than those described as ‘non-intimate’ and this idea was reiterated by the South African Society of Human Genetics (SASHG).⁴⁸⁷

The other concerns all related to Clause 6, Chapter 5B which described the instructions for the management of the NDDSA. Firstly, the reference made to ‘informed consent’ when addressing the conditions under which samples can be obtained from volunteers was deemed problematic by the SASHG as it did not mention how the granting of consent was to be proved.⁴⁸⁸ Provisions regarding the Personnel, Contractor and Supplier Elimination Index were also questioned by the SASHG as it is impractical and unnecessary to obtain samples from ‘everyone involved with the manufacturing of the equipment or consumables’.⁴⁸⁹ Provisions instructing the generation of the profiles of those actually conducting the tests would be more useful.⁴⁹⁰

The SASHG, Centre for Constitutional Rights (CCR), Forensic DNA Consultants, Medical Rights Advocacy Network (MERAN) and Mrs Scheán Babst raised concerns about the adequacy of 15N in establishing the necessary quality control mechanisms.⁴⁹¹ The SASHG, SAHRC, MERAN, POPCRU and Forensic DNA Consultants proposed that the accreditation procedure, especially for private laboratories, be clarified.⁴⁹² An important consideration was highlighted by Mrs Scheán Babst in her capacity as a previous Head of Training at the FSL.⁴⁹³ Her submission dealt

⁴⁸⁴ Ibid

⁴⁸⁵ Submission to the Portfolio Committee of Police by Antony Cooper, CSIR, 6 November 2009. Available at www.pmg.org.za

⁴⁸⁶ Ibid

⁴⁸⁷ Submission to the Portfolio Committee of Police by SASHG, 6 November 2009. Available at www.pmg.org.za

⁴⁸⁸ Ibid

⁴⁸⁹ Ibid

⁴⁹⁰ Ibid

⁴⁹¹ Submissions to the Portfolio Committee of Police, 6 November 2009. Available at www.pmg.org.za

⁴⁹² Ibid

⁴⁹³ Submission to the Portfolio Committee of Police by Mrs Sheán Babst, DNAbiotec, 6 November 2009. Available at www.pmg.org.za

extensively with the regulations of quality control systems and she expressed concern at the fact that the National Commissioner had been charged with overseeing the drafting of quality standards.⁴⁹⁴ Usually, quality assurance is implemented by national bodies representative of the profession and the South African National Accreditation System is currently responsible for the determination of quality standards and the accreditation of laboratories.⁴⁹⁵ However, the future role of this institution for these purposes has not been addressed by the Bill and Mrs Babst suggested that this be altered.⁴⁹⁶

Mrs Babst also addressed the instructions on training requirements as set out in Section 15Q and was again very thorough in her comments on this issue which focussed mainly on who would be responsible for establishment of the relevant training programmes and how these would be executed.⁴⁹⁷ Paragraph two of Section 15C and Section 15Q gives this responsibility to the National Commissioner while the roles of other important bodies such as the Department of Education, the Department of Labour, the South African Qualifications Authority, Council on Higher Education, Quality Council for Trades and Occupations, South African Council for Natural Scientific Professions and others have not been specified.⁴⁹⁸ An additional matter for consideration by the authorities was identified as the need for training programmes to be available to private sector employees as well so as to strengthen the field as a whole.⁴⁹⁹

5.2.1.3 Responses and deliberations

The criticisms responded to by the SAPS and the DoJ were not as numerous as those dealt with by the Ad Hoc Committee. The responses largely referred to the submissions made by the National Council of Women of South Africa, the Centre for Constitutional Rights, the LSSA and the NPA, as these were the only submissions dealing with non-DNA related concerns.⁵⁰⁰ The issues can again be grouped into the categories of human rights and logistics.

(i) Human rights

⁴⁹⁴ Ibid

⁴⁹⁵ Ibid

⁴⁹⁶ Ibid

⁴⁹⁷ Ibid

⁴⁹⁸ Ibid

⁴⁹⁹ Ibid

⁵⁰⁰ Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

The first issue refers to submissions made in the first round of public participation by the LSSA and the NPA. The comments on the definition of 'body prints' in Section 36A made by these parties were addressed.⁵⁰¹ The LSSA felt that the taking of body prints would violate an individual's right to privacy while the NPA felt that the definition of body prints was too restrictive.⁵⁰² The Portfolio Committee took both of these comments into account in their deliberations. It was decided that the definition would be broadened to include all body parts exclusive of genitalia, together with a condition that the prints had to be related to a crime scene as a form of safeguard against abuse.⁵⁰³ As described previously, the Ad Hoc Committee had also expanded the definition of the term but had not allowed for all body parts to be printed.⁵⁰⁴

The topic of arrestee sampling featured quite dominantly in the deliberations of the Portfolio Committee on Police⁵⁰⁵ and even though only finger printing was being considered in this case, a number of the arguments were similar to those held in the previous committee. The constitutionality of the finger printing of minor offences such as traffic violations, with special reference to Sections 36B and 36C was questioned by some members of the Portfolio Committee,⁵⁰⁶ the CCR,⁵⁰⁷ and the other submissions dealt with by the previous committee.⁵⁰⁸ The aim of the legislation to ensure that fingerprints were actually being taken was considered.⁵⁰⁹ It was decided that Section 36B (1)(a)(iii) would be split into schedules, providing for the compulsory finger printing of persons arrested for Schedule 1 offences⁵¹⁰ with the National Commissioner able to qualify any other offences which warrant finger printing.⁵¹¹

⁵⁰¹ Ibid

⁵⁰² Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Portfolio Committee of Police meeting on 11 November 2009. Available at www.pmg.org.za

⁵⁰³ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵⁰⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁵⁰⁵ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵⁰⁶ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵⁰⁷ Submission to the Portfolio Committee of Police by the Centre for Constitutional Rights, 6 November 2009. Available at www.pmg.org.za

⁵⁰⁸ Summary of comments on the Criminal Law (Forensic Procedures) Amendment Bill. Presented in Ad Hoc Committee of Criminal Law (Forensic Procedures) Amendment Bill meeting on 10 February 2009. Available at www.pmg.org.za

⁵⁰⁹ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵¹⁰ Criminal Procedure Act 51 of 1977, c33, sched1. See Annexure B

⁵¹¹ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

The retention period of finger and other prints was debated extensively by the Portfolio Committee, especially in light of the fact that the Bill allowed for access to databases containing the prints of innocent people.⁵¹² Reference was made to the *S and Marper* judgement for the first time in the Portfolio Committee on Police meetings and it appeared as though members of this committee had no prior knowledge of this ruling.⁵¹³ In compliance with international standards, the Portfolio Committee agreed that the prints of convicted offenders should be retained indefinitely but consensus on the case of persons acquitted was a more complicated matter.⁵¹⁴ Most of the members felt that the prints of innocent people should be destroyed immediately. However, the chairperson suggested that if the SAPS and the DoJ could present the Portfolio Committee with compelling reasons for the retention of these prints, they would consider authorising the retention of these prints.⁵¹⁵ SAPS stated that the situation in South Africa was very different from that in the UK and this should indicate that the ECHR judgement was not necessarily applicable in this case.⁵¹⁶ The DoJ also made mention of the need to build up the AFIS database as the SAPS would only have restricted access to the eNATIS and HANIS databases.⁵¹⁷ The Portfolio Committee did not find these reasons compelling as they understood that the aim was to integrate all the fingerprint databases in the future anyway. Dr Jacobs from the SAPS replied by saying that this would not happen in the near future and the need for a large database was more urgent at this stage. The final decision of the Portfolio Committee was to instruct the immediate destruction of the prints of those arrestees found innocent, with the time limit of the term 'immediate' being three months.⁵¹⁸

The importance of the inclusion of the necessary safeguards was once again evident in the discussions of the Portfolio Committee and the submissions made by the public. The CCR expressed worry about the provisions related to the allocation of responsibility for controlling samples and databases, and the practice of supervising parades.⁵¹⁹ The SAPS and DoJ felt that the Bill adequately addressed these issues and the Portfolio Committee did not alter these provisions.⁵²⁰ The Portfolio Committee focussed more on the safeguards around the misuse of

⁵¹² Ibid

⁵¹³ Ibid

⁵¹⁴ Ibid

⁵¹⁵ Ibid

⁵¹⁶ Ibid

⁵¹⁷ Ibid

⁵¹⁸ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵¹⁹ Submission to the Portfolio Committee of Police by CCR, 6 November 2009. Available at www.pmg.org.za

⁵²⁰ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

information. Safety measures for the storage of prints, access to the databases in practical and legislative senses, as well as the seriousness of the penalties imposed on those not complying with the regulations were discussed.⁵²¹ Better instructions for the storage of prints were suggested by the Portfolio Committee and they required more facts on the logistics of the current databases to advise these provisions, delaying any changes to the draft Bill.⁵²² The Portfolio Committee did consider authorising harsher sentences for those abusing forensic information but it was decided that this was not necessary and no alterations were made to these provisions.⁵²³

The final human rights issue deliberated by the Portfolio Committee was the potential infringements on children's rights in the current provisions of the Bill. The Portfolio Committee was concerned about the treatment of child offenders in the same manner as adult offenders as according to the Bill.⁵²⁴ Focus was placed on provisions allowing finger printing without a warrant, the lack of provision for an adult to be present when a child was being fingerprinted, and the retention period of fingerprints for children.⁵²⁵ To address this problem, the Portfolio Committee was briefed by the DoJ on the Child Justice Act of 2008 and it was decided that the State Law Advisors should adjust the Bill to address any shortcomings in the Bill.⁵²⁶ Recommendation was made that the Bill should require that a parent or social worker be present when a child was fingerprinted.⁵²⁷

(ii) Logistical matters

The term 'speculative search' was problematic for three of the public participants, namely the CCR, the South African Gunowner's Association and the CGE, as the 'dictionary definition' of 'speculative' was not in line with the features of the search.⁵²⁸ Both the SAPS and the DoJ agreed

⁵²¹ Ibid

⁵²² Ibid

⁵²³ Ibid

⁵²⁴ Ibid

⁵²⁵ Meeting of the Portfolio Committee of Police on 18 November 2009 – Child Justice Act briefing. Minutes available at www.pmg.org.za

⁵²⁶ Ibid

⁵²⁷ Ibid

⁵²⁸ Submissions to the Portfolio Committee of Police, 6 November 2009. Available at www.pmg.org.za

with this and the term was changed to ‘comparative search’.⁵²⁹ The Ad Hoc Committee had received the criticism from the CGE but had felt it unnecessary to change the term.⁵³⁰

Although the draft of the split Bill included the definitions of ‘non-intimate’ and ‘intimate’ samples for the purposes of allowing medical practitioners to collect these samples, the Portfolio Committee felt that this created some confusion.⁵³¹ This provision would only be useful if the definition of intimate samples were expanded to include blood finger pricks and buccal swabs.⁵³² For this reason, it was decided to do away with these definitions and revert back to the term ‘blood samples’ with reference to the provisions for medical practitioners to collect DNA samples.⁵³³ The wording of Section 37 was also changed so that it gave medical practitioners the authority to take the blood samples but did not make this compulsory. This was not necessarily what the SAPS had hoped for as they felt that police officials could easily be trained to perform the collection of non-intimate samples and that having medical practitioners perform the procedure was too cumbersome.⁵³⁴

The National Council of Women of South Africa raised issue with the fact that the current fingerprint databases (HANIS and eNATIS) often contained faulty information and that this could result in false identifications being made and, subsequently, false convictions.⁵³⁵ The DoJ addressed this worry with the assurance that databases and comparative searches would be used for identification purposes only.⁵³⁶ Further confirmation procedures, such as the re-taking of fingerprints, would also have to be carried out.⁵³⁷

The inclusion of a new subsection in Section 212 of the split Bill was proposed by the DoJ.⁵³⁸ This paragraph would allow for experts in the field of the type of evidence gathered to supply an

⁵²⁹ Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵³⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁵³¹ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵³² Ibid

⁵³³ Ibid

⁵³⁴ Ibid

⁵³⁵ Submission to the Portfolio Committee of Police by NCWSA, 6 November 2009. Available at www.pmg.org.za

⁵³⁶ Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵³⁷ Ibid

⁵³⁸ Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

affidavit to verify evidence in place of having to appear in court to do so.⁵³⁹ This point was not contested by any of the Portfolio Committee members and the inclusion of this provision was approved.⁵⁴⁰

A final matter in relation to the logistical topics of deliberation relates to the implementation of the Bill and the Portfolio Committees discussions on this issue will be described in more detail in the following section. However, one of these matters directly affecting the legislation was raised by the LSSA and MERAN submissions in their questioning of the competence of the police officers to take fingerprints and body prints.⁵⁴¹ The Portfolio Committee questioned the SAPS on the training of police officers in these skills.⁵⁴² The SAPS responded by saying that police officers are currently trained in how to take these prints although sensitivity training may have to be included in the programmes so as to allay some of the fears expressed by the LSSA and MERAN.⁵⁴³ The SAPS stated that the costs related to this would be minimal.⁵⁴⁴ The result was that this provision was not amended.⁵⁴⁵

5.2.2 Discussions around implementation

The SAPS presented an implementation plan to the Portfolio Committee in their second meeting⁵⁴⁶ by the recommendation of the Ad Hoc Committee. The presentation dealt with intentions of the department for the next five years with regards to the provisions of the Bill, and included a budget for the expected costs of implementation.⁵⁴⁷ At this stage the Bill had not yet been split and the presentation included provisions for DNA analysis related plans. The Portfolio Committee expressed their disappointment in the quality of the content of the presentation as the plan was presented as draft and appeared to have been compiled without the consultation of the other departments expected to play a role in this implementation.⁵⁴⁸ The Portfolio Committee thus

⁵³⁹ Ibid

⁵⁴⁰ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵⁴¹ Submissions to the Portfolio Committee of Police, 6 November 2009. Available at www.pmg.org.za

⁵⁴² Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵⁴³ Ibid

⁵⁴⁴ Ibid

⁵⁴⁵ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁵⁴⁶ Meeting of the Portfolio Committee of Police on 7 October 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵⁴⁷ Meeting of the Portfolio Committee of Police on 7 October 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵⁴⁸ Ibid

requested that a more comprehensive strategy be outlined by the SAPS at a later stage as they felt that the issue of implementation was one of significant importance and needed to be dealt with before the Bill could be passed.⁵⁴⁹

Before the next briefing by the SAPS, the DHA gave a presentation on the logistics of the HANIS database and how the sharing of information with the SAPS could be achieved.⁵⁵⁰ Points for consideration coming from that meeting centred on the safeguards against corruption, existing and required, in the form of legislation, physical security and access control.⁵⁵¹ The matter of inter-departmental coordination was again of importance and it was suggested by one of the Portfolio Committee members that a Memorandum of Understanding be drawn up between the DHA and the SAPS.⁵⁵² This would need to address the operational details such as role responsibility, system availability, expectations and after hours access, as well as safeguards and custodianship.⁵⁵³

The second briefing from the SAPS was more detailed and included the strategies for system and equipment upgrades, the training and recruitment requirements, and the expected costs for these endeavours.⁵⁵⁴ Approaches considered for the sharing of database information between departments were presented.⁵⁵⁵ The State Information Technology Agency (SITA) also presented their strategies for the roles they would play in implementation which related to database development and facilitation.⁵⁵⁶ The Portfolio Committee again was not satisfied with the SAPS presentation as it was still in draft format and often did not give specifics.⁵⁵⁷ The Portfolio Committee were not convinced that the SAPS were ready to implement the Bill, especially due to the high costs predicted and the lack of collaboration with other departments, an observation confirmed in the SITA presentation.⁵⁵⁸ The SAPS indicated that if the projected budgetary allocations were awarded, they were confidently in a position to implement the Bill.⁵⁵⁹ However,

⁵⁴⁹ Ibid

⁵⁵⁰ Meeting of the Portfolio Committee of Police on 3 November 2009 – DHA briefing. Minutes available at www.pmg.org.za

⁵⁵¹ Meeting of the Portfolio Committee of Police on 3 November 2009 – DHA briefing. Minutes available at www.pmg.org.za

⁵⁵² Ibid

⁵⁵³ Ibid

⁵⁵⁴ Meeting of the Portfolio Committee of Police on 4 November 2009 – SAPS briefing. Minutes available at www.pmg.org.za

⁵⁵⁵ Ibid

⁵⁵⁶ Ibid

⁵⁵⁷ Ibid

⁵⁵⁸ Meeting of the Portfolio Committee of Police on 4 November 2009 – SAPS briefing. Minutes available at www.pmg.org.za

⁵⁵⁹ Ibid

the Portfolio Committee recommended that a more integrated approach be assumed.⁵⁶⁰ On this note, the Portfolio Committee requested the formation of an integrated task team to discuss implementation strategies. These would then have to be communicated to the Portfolio Committee.⁵⁶¹

The recommended task team was created and they presented their implementation strategy to the Portfolio Committee a week later.⁵⁶² The team included representatives from the OCJSR, SAPS, the Department of Correctional Services (DCS), DHA, DoJ, SITA and the Integrated Justice System.⁵⁶³ The strategy presented addressed tasks related to human resources, equipment and furniture, consumables, training, IT capacity, business rules, accommodation and national instructions, and the tasks of the relevant departments in approaching these undertakings.⁵⁶⁴ The budget that had been presented by SAPS in the previous meeting was presented again.⁵⁶⁵ The task team felt that government was ready for the implementation of the Bill but the Portfolio Committee were still concerned about a number of factors.⁵⁶⁶ Exact plans related to the integration of databases were still necessary and a more accurate budget was required.⁵⁶⁷ However, the Portfolio Committee were feeling more at ease about the integration of the departments and the progress of the implementation strategies. They still expected regular updates on the development of these plans and the progress of the task team in achieving their aims and only when a concrete strategy was developed could the Bill be passed.⁵⁶⁸

The meetings of the Portfolio Committee were brought to an end by the closing of Parliament in December 2009 and the meetings described in this work include all the discussions held until this point. It was accordingly recommended that further deliberations on the Bill be recommenced in March 2010.

5.3 Conclusion

⁵⁶⁰ Ibid

⁵⁶¹ Ibid

⁵⁶² Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵⁶³ Presentation by task team to the Portfolio Committee of Police at their meeting on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵⁶⁴ Ibid

⁵⁶⁵ Ibid

⁵⁶⁶ Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵⁶⁷ Ibid

⁵⁶⁸ Ibid

Despite the initial urgency expressed by the DoJ to pass the Bill, the committee stage of the Parliamentary proceedings revealed a number of controversial and problematic features of the legislation. Discussions revolved around ethical issues related to the taking and retaining the body prints and DNA of innocent people or those arrested for minor crimes; the methods of obtaining these samples; and the assurance that the information derived from these samples will not be abused. Logistical issues focussed on the capability for implementation, with concerns ranging from the abilities of the police to the cost implications. These have been felt to be so important as to delay the passing of the Bill in terms of time allocations and also in terms of splitting the Bill in order to discuss only some of the provisions but in a more thorough manner. The relevance of the debates and decisions made by the committees in terms of the background leading up to the Bill, the scientific principles utilised in the procedures described and the criminological phenomena taking place at this point in time may shed some light on the manner in which this piece of legislation should be approached.

CHAPTER 6: AN ANALYSIS OF THE DEBATES

The circumstances under which the Criminal Law (Forensics Procedures) Amendment Bill was conceived in South Africa relate significantly to trends observed in the criminological world. As was explained before, the Bill was drafted as part of a multi-faceted initiative directed by the government which focusses on the improvement of the criminal justice system.⁵⁶⁹ The rhetoric behind this CJS reform is the ‘zero tolerance’ approach to crime which has been a dominant strategy employed by the South African government to reduce crime levels.⁵⁷⁰ This attitude of a ‘war on crime’ has impacted the manner in which the criminal justice process is carried out and as such, adjustments to the CJS can be seen as the honing of the weapons being used to fight this war.⁵⁷¹ The Bill has the aim of improving the criminal intelligence capabilities of the police through the utilisation of forensic techniques.⁵⁷² This idea of forensic techniques serving as instruments of combat is not something new.⁵⁷³ Over the last two decades, forensic techniques have become increasingly popular for investigative purposes and the success of these techniques in identifying perpetrators is proclaimed by most jurisdictions making use of them.⁵⁷⁴ The effect of

⁵⁶⁹ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 20 January 2009 – briefing by Deputy Minister of DoJ. Minutes available at www.pmg.org.za

⁵⁷⁰ J Rauch ‘Police reform and South Africa’s transition’ at *South African Institute for International Affairs conference* (2000)

⁵⁷¹ Ibid

⁵⁷² Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 20 January 2009 – briefing by Deputy Minister of DoJ. Minutes available at www.pmg.org.za

⁵⁷³ SJ Walsh ‘Legal perceptions of forensic DNA profiling Part I: A review of the legal literature’ (2005) 155 *Forensic Science International* 51

⁵⁷⁴ PD Martin ‘National DNA databases—practice and practicability. A forum for discussion’ (2004) 1261 *International Congress Series* 1

these factors on the South African situation has been an atmosphere of major expectation around the ability of the Bill to have a positive impact on the CJS.

6.1 The expectations of the Bill

There was a definite sense of optimism felt for the capability of the Bill to improve the forensic capacity of the criminal investigative component of the CJS.⁵⁷⁵ Evidence of this can be found in the speedy approval of the Bill by the Cabinet, the fast-tracking of the processes of Parliament, and the motivations given by politicians, members of the public, public benefit organisations and the media for the importance of the Bill. However, these high expectations create a very real danger that the responsibility for the renovation of the entire criminal justice system will fall solely onto the forensic sciences division, and onto DNA profiling in particular.⁵⁷⁶ This is unrealistic as the reformation of the CJS requires a collective approach whereby the multiple facets of the system are developed, improved and expanded. The danger lies in that if the designated department fails to achieve its anticipated aims, the whole system will fall apart due to the focus placed on this one area. This point is particularly relevant in South Africa, as the current level of sophistication in the utilisation of forensic techniques is minimal and development in this area will take plenty of time and resources.⁵⁷⁷ As it stands, the forensic division is experiencing a severe backlog in the processing of samples due to a shortage of staff and a lack of expertise in the field.⁵⁷⁸ Since the Bill was introduced as part of an integrated CJS renovation initiative, the likelihood of this happening is low but there needs to be an awareness of this possibility.

In addition to the collaborative CJS reform approach, the danger of a failed renovation forensic division is being addressed through the emphasis on establishing the capabilities of the various role players to implement the Bill before passing the legislation.⁵⁷⁹ Precedence for the determination of implementation capabilities before the passing of a Bill was set in the deliberations of the Child Justice Bill in 2008⁵⁸⁰ and it is encouraging to see that this has not been blindsided in an effort to have the Bill passed as quickly as possible. Although some members of

⁵⁷⁵ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 20 January 2009 – briefing by Deputy Minister of DoJ. Minutes available at www.pmg.org.za

⁵⁷⁶ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51

⁵⁷⁷ South African Police Services Annual Report, 2008/2009 by the National Commissioner for the Department of Safety and Security at 125

⁵⁷⁸ Ibid

⁵⁷⁹ Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁵⁸⁰ A Skelton and J Gallinetti 'A long and winding road: The Child Justice Bill, civil society and advocacy' (2008) 25 *South Africa Crime Quarterly* 3

the Ad Hoc Committee were disappointed that the Bill had not been finalised in their term and felt that implementation strategies should not be their concern,⁵⁸¹ the recommendation of the Ad Hoc Committee to first establish the capacity for the implementation of the Bill was taken very seriously by the Portfolio Committee on Police. The significant delay in the proceedings under the Portfolio Committee due to the focus on the development of adequate implementation strategies goes a long way towards allaying the fears of the Bill being only a descriptive piece of legislation with no real effects. As yet, the strategies presented by the relevant departments have not been to the satisfaction of the Portfolio Committee⁵⁸² and it remains to be seen at what stage the Portfolio Committee will approve of the plans put in place by the implementation task team.

Despite these efforts by the committees, an additional area of concern with regards to the expectations of the Bill has not been fully considered. This is the potential for forensic sciences to ‘appropriate’ the criminal justice process.⁵⁸³ The general portrayal of the infallibility of science and its application in criminal investigative realms could lead to a reliance on these techniques at the expense of other methods of investigation.⁵⁸⁴ DNA evidence in particular has been depicted as the ‘silver bullet’ in criminal prosecutions and it is possible that this could result in investigations and prosecutions being defined by this technique.⁵⁸⁵ The media has played a significant role in this phenomenon and their contribution towards the ‘failsafe’ impression of forensic techniques has been dubbed the ‘CSI effect’.⁵⁸⁶ It may be necessary for the relevant authorities to consider the potential for the CJS to become too reliant on forensic techniques at the expense of other avenues of process. The PRU did make the suggestion to include a provision stating that DNA evidence could not be the only evidence presented in the court and that no prosecution could be made solely on the basis of DNA evidence.⁵⁸⁷ This point was not discussed and the suggestion was not considered but since the Portfolio Committee on Police are still due to discuss the sections of the Bill pertaining to DNA profiling, this topic could be still be considered.

⁵⁸¹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 23 March 2009 – adoption of report. Minutes available at www.pmg.org.za

⁵⁸² Ibid

⁵⁸³ SJ Walsh ‘Legal perceptions of forensic DNA profiling Part I: A review of the legal literature’ (2005) 155 *Forensic Science International* 51

⁵⁸⁴ SJ Walsh ‘Legal perceptions of forensic DNA profiling Part I: A review of the legal literature’ (2005) 155 *Forensic Science International* 51

⁵⁸⁵ SA Cole and R Dioso-Villa ‘CSI and its effects: media, juries, the burden of proof’ (2006-2007) 41 *New England Law Review* 435

⁵⁸⁶ Ibid

⁵⁸⁷ Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

The theme of the utilisation of forensic techniques, DNA profiling in particular, in order to establish a legitimate CJS has been observed in other writings.⁵⁸⁸ Walsh cited work by D Kellie which suggested that technologically advanced forensic techniques offer a sense of protection to the public.⁵⁸⁹ This is a valid point in light of the observed increased preoccupation with the notion of risk in the modern Western culture. Lianos and Douglas explain how risk has been propelled into the centre of social interaction through the automation of mechanisms of control.⁵⁹⁰ Increased awareness of crime and the fear that is associated with this creates the capacity for novel approaches to crime fighting to become a source of legitimacy in a 'risk society'.⁵⁹¹ Forensic science has stepped into this role very comfortably.⁵⁹² Although the popularity of forensic science has received favour for these reasons worldwide, it is possible that South Africans are more inclined to be influenced by these factors as these have been experienced in an extreme capacity. The consistently high crime rates by international standards have caused the public's confidence in the CJS to be lowered to a point of a crisis of legitimacy.⁵⁹³ This explains the urgency expressed by the government in affecting the changes that would be stimulated by the Bill.

However, it must be recognised that the eradication of risk does not end with the ability to identify the individuals responsible for posing a danger to personal safety. The other components of the CJS need to be functioning at a level which can adequately deal with the following stages of the criminal justice proceedings. This again stresses the importance of executing a collaborative CJS renovation.

The motivations for the Bill, explicit as well as implicit, seem legitimate and have the appearance of being well-intentioned. However, these motivations have resulted in the drafting of provisions that have been controversial for human rights and systemisation reasons. In the deliberations, an effort was made to balance the controversial issues with the necessity of the provision for the legitimate aim of empowering the CJS. The balancing of human rights is approached through the Limitations Clause as it appears in Section 36 of the Constitution⁵⁹⁴ and the heart of the matter lies in this provision. The Limitations Clause allows for any right in the Bill of Rights to be limited

⁵⁸⁸ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51

⁵⁸⁹ SJ Walsh 'Legal perceptions of forensic DNA profiling Part I: A review of the legal literature' (2005) 155 *Forensic Science International* 51 at 53

⁵⁹⁰ M Lianos and M Douglas 'Dangerization and the end of deviance' (2000) 40 *British Journal of Criminology* 261

⁵⁹¹ C McCartney *Forensic identification and criminal justice: forensic science, justice and risk* (2006)

⁵⁹² *Ibid*

⁵⁹³ J Rauch 'Police reform and South Africa's transition' at *South African Institute for International Affairs conference* (2000)

⁵⁹⁴ Constitution of the Republic of South Africa No. 108 of 1996, s36

provided that the limitation is reasonable and justifiable in achieving a desirable purpose in an open democratic society.⁵⁹⁵ The rights being infringed by the Bill have included the right to privacy, equality, human dignity, bodily integrity and children's rights⁵⁹⁶ and the discussions of these rights will take place in the context of the provisions violating these rights.

Achieving the balance between these factors has been a difficult task for the committees but it is possible that a broader consideration of the factors contributing to the different viewpoints may assist in this process.

6.2 Arrestee sampling

The nature of the problems related to arrestee sampling are generally concerned with the infringement of the right to privacy. In particular, the question is whether this violation could be justified when the crime committed was not serious or if the samples are not necessary for investigative purposes.⁵⁹⁷ The justification for this limitation was given as being the necessity of building up a sufficiently large database so as to improve the chances of obtaining a positive identification when searching the database in order to obtain a possible match with an existing crime scene sample on the database.⁵⁹⁸

While the Ad Hoc Committee seemed to feel that this justification was sufficient for arrestee finger printing as well as DNA sample collection,⁵⁹⁹ the Portfolio Committee on Police felt that it only justified taking the fingerprints of persons committing serious offences.⁶⁰⁰ This decision was made despite the submissions and evidence claiming that the fingerprints and DNA samples collected from persons committing minor offences were subsequently sometimes linked to the

⁵⁹⁵ Ibid

⁵⁹⁶ 'Comparative Analysis' Annexure to Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 26 January 2009 – briefing by PRU. Available at www.pmg.org.za

⁵⁹⁷ M Guillén et al. 'Ethical-legal problems of DNA databases in criminal investigation' (2000) 26 *Journal of Medical Ethics* 266, Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za, Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁵⁹⁸ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁵⁹⁹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁶⁰⁰ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

perpetrators of serious offences i.e. previously committed but undetected.⁶⁰¹ Some perspective on this issue can be obtained through the practices of other jurisdictions in the development of efficient criminal investigative databases. In the UK, the DNA database expansion project was driven by legislation authorising the collection of DNA samples from anyone charged with a 'recordable offence' as opposed to the 'all arrestees' provision in the Bill.⁶⁰² In the USA, individual states draft their own legislation and most of the states do not provide for the DNA sample collection from all arrested persons.⁶⁰³ Yet, the CODIS database is still regarded as one of the leading national DNA databases. These examples show that databases can still be developed to sufficient size without authorising controversial practices such as arrestee sampling. Also, the success of the technique through the expansion of the database will only be effective if the other components of the criminal justice system are able to handle the implications of a more efficient investigative division. Over-crowding in prisons and delays in criminal court proceedings need to be addressed before the effect of a large database will be advantageous for the functioning of the CJS. Thus, the decisions of the Portfolio Committee on Police to limit the provision seem more rational than the all inclusive provision in its original state, especially as this legislation can be modified at a later stage.

The decision of the Ad Hoc Committee is also interesting for reasons related to the social condition of the 'risk society'. Databases have been seen to be an important aspect in the creation of the risk society as they have allowed for increased surveillance capacity and have been part of the automation of control.⁶⁰⁴ The utilisation of databases within the phenomenon of the 'surveillance creep' has been a practical illustration of one aspect of the risk society, being the increase in the concession of liberty for the sake of safety.⁶⁰⁵ Fear has again played a major role in the development of this trend and the extent to which this could be developed is illustrated in the events leading up to the setting of the bar for increased security measures in a risk society. The terrorist attacks on New York in 2001 and London in 2003 resulted in massive revamping of the security systems in these countries, the features of which involved extensive limitations of public

⁶⁰¹ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

⁶⁰² R Williams and P Johnson 'Wonderment and dread': representations of DNA in ethical disputes about forensic DNA databases' (2004) 23 *New Genetics and Society*

⁶⁰³ Stevens 'Arresting crime: Expanding the scope of DNA databases in America' (2001) 79 *Texas Law Review*

⁶⁰⁴ M Lianos and M Douglas 'Dangerization and the end of deviance' (2000) 40 *British Journal of Criminology* 261

⁶⁰⁵ D Nelkin and L Andrews 'DNA identification and surveillance creep' (1999) 21 *Sociology of Health and Illness* 689

liberty in pursuit of maintaining control.⁶⁰⁶ The extent to which this has influenced security measures in general is evident in the submissions received from the public which mostly expressed their support of the Bill.⁶⁰⁷ It must also be said that the legislation drafted in South Africa has taken precedence from these countries where the war on terror has played a significant role in the criminal justice sphere.⁶⁰⁸ Thus, the relevance of these measures in the South African society needs to be determined.

In light of these considerations, it would seem that the provision for arrestee sampling is a factor of the social control mechanism which is following the trends of risk management practices. Although an effort has been made to limit the level of surveillance governed in this provision, the likelihood is that this will be increased again at another stage.⁶⁰⁹ The continual expansion of the criteria which would qualify an individual for the collection of their DNA sample and fingerprints in the UK and the USA is illustrative of this.⁶¹⁰ For these reasons, it would be desirable to retain liberty as far as possible without compromising the potential for a safe existence. experience has shown that criteria can be limited further than the arrestee sampling proposed in the Bill while still providing adequate safety guarantees. The suggestion of the Portfolio Committee on Police to limit the taking of fingerprints to only those arrested for Schedule 1 offences would seem a justifiable option even despite objections of the confusion this may cause in implementation. A similar provision may be considered for the regulation of the collection of DNA samples in the deliberations on these sections.

The logistical arguments around arrestee sampling included concerns about the effect this provision may have on the already excessive workload of the SAPS and the FSL. Issues of capacity are very much a reality in the South African context and the argument raised here should not be dismissed. Again, the limitation of the provision of arrestee sampling would seem a legitimate solution to this problem. Modern policing has involved the extensive increase in and transformation of the responsibilities of the police and this has impacted on the ability of the police

⁶⁰⁶ JW Whitehead and SH Aden 'Forfeiting "enduring freedom" for "Homeland Security": A constitutional analysis of the USA Patriot Act and the Justice Department's anti-terrorism initiative' (2001-2002) 51 *American University Law Review* 1081

⁶⁰⁷ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 3 February 2009 – public hearings. Minutes available at www.pmg.org.za

⁶⁰⁸ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

⁶⁰⁹ MA Jobling and P Gill 'Encoded evidence: DNA in forensic analysis' (2004) 5 *Nature Reviews* 739

⁶¹⁰ R Williams and P Johnson 'Wonderment and dread': representations of DNA in ethical disputes about forensic DNA databases' (2004) 23 *New Genetics and Society*

to perform their duties satisfactorily.⁶¹¹ For this reason, the additional workload that will result from the implementation of the Bill may not have the desired effect of increasing the confidence in the police, and it may even have the opposite effect.

6.3 Retention of samples

The matter of the retention period of information and samples was always going to be an important issue in light of the ruling by the ECHR on the *S and Marper* case. While it was noted that the South African situation is not the same as that in the UK, the degree to which this international decision will be adapted needs to be established. Arguments of a violation of privacy remain tricky due to differing opinions on the nature of the information contained in fingerprints, DNA samples and DNA profiles. While the *S and Marper* judgement found that all three of these constituents contained information that related to their private lives,⁶¹² the descriptions in Chapter 2 show that fingerprints and DNA profiles do not convey personal information although DNA samples do contain the full DNA sequence of the individual. This presents a conundrum of issues for consideration by legislators.

The motivation for the indefinite retention of fingerprints and DNA profiles again related to the development of a sufficiently large database to improve the chances of the identification of perpetrators.⁶¹³ The committees needed to establish whether this justification was sufficient in light of the considerations just mentioned. The Ad Hoc Committee could not finalise the retention period of evidence, as trying to cater for the needs of the SAPS to establish a sizeable database as well as for the human rights considerations was too complicated.⁶¹⁴ The Portfolio Committee on Police made the decision to retain the fingerprints of convicted persons indefinitely but command the destruction of the fingerprints of anyone not convicted, acquitted, or not tried for criminal charges in order to minimise privacy concerns.⁶¹⁵

⁶¹¹ DH Bayley and CD Shearing 'The new structure of policing: description, conceptualization and research agenda' (2001)

⁶¹² *S and Marper v The United Kingdom* (2004) European Court of Human Rights 30562, 30566, unreported Judgement available at <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>, accessed 1 December 2009

⁶¹³ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁶¹⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁶¹⁵ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

Recommendations for the approaches that could be taken for this provision relate to the information portrayed by the different constituents of the forensic techniques. While DNA profiles do not reveal any personal information (other than gender), these are often stored together with personal information such as the name and contact details of the individual.⁶¹⁶ Some jurisdictions have adjusted these storage procedures so that the profile and the identification of a particular individual are stored separately and only linked by a reference number.⁶¹⁷ Adaptation of this concept would limit access to the personal information of an individual and the violation of the right to privacy is minimised.

The storage of DNA samples is a different matter entirely as the potential for infringement of the right to privacy as well as the misuse of personal information lies almost completely with this element. The retention of samples is desirable for situations where a DNA profile could not be successfully obtained, the DNA profile becomes damaged or lost in any way, or the development of new techniques of profiling occurs.⁶¹⁸ However, these issues do not pose unsolvable problems and the concerns of privacy remain far more important. Therefore, the retention of DNA samples after they have served their purpose would be unnecessary and instructing their immediate destruction would alleviate most of these worries.⁶¹⁹ Since SAPS raised this very point,⁶²⁰ legislators would do well to take it into account.

The recommendations for the retention period of DNA profiles and samples are, thus, as follows. DNA profiles should be retained indefinitely with those of innocent individuals being destroyed after a particular time period (as was suggested in the original draft of the Bill) while DNA samples should be destroyed immediately after a profile has been obtained from the sample.

The decision of the retention of fingerprints has been complicated by the provision in the Bill allowing for the SAPS to have access to the HANIS and eNATIS databases. These databases contain the fingerprints of the general public, many individuals of which have not even been

⁶¹⁶ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

⁶¹⁷ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

⁶¹⁸ *Ibid*

⁶¹⁹ 'Keeping the right people on the DNA database: Science and Public Protection. Summary of Responses, public consultation 7 May – 7 August 2009' Home Office. Available at <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-2788.pdf>, accessed 1 December 2010

⁶²⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

arrested for a crime.⁶²¹ The necessity for this provision lies in the inadequacy of the AFIS database at this stage and the massive advantage that this access will afford the police in successfully identifying criminals.⁶²² It was made clear that the aim would be to eventually integrate all of these databases, although for the time being access would be limited to conditions of special requests.⁶²³ The argument around the retention of the fingerprints of acquitted persons seems irrelevant and, thus, authorising the immediate destruction of the fingerprints of innocent individuals would not disadvantage the operation of the police in a serious manner.⁶²⁴ However, it does not solve the problem of limiting the invasion of privacy of innocent individuals as access to the civilian databases is still provided for. It also does not allow for the expansion of the AFIS database and this would be beneficial as a more efficient criminal database would eliminate the need to have access to civilian databases.

The recommendation for the retention of fingerprints is then the same as for DNA profiles: indefinitely for convicted individuals and a time limit for innocent individuals. Access to HANIS and eNATIS is still desirable, as, despite the fears of human rights violations, fingerprints do not convey personal information and the AFIS database is not at a level suitable for identification purposes. As a measure ensuring that the system is not abused, this provision can be altered so that access remains restricted and is only authorised until a time when the AFIS database is sufficient for criminal investigations. Access to civilian databases could then be denied without being detrimental the criminal intelligence aspect of the SAPS.

The decision by the ECHR together with the resistance against extended retention periods is an interesting development in the face of the features of the risk society discussed earlier. Instead of conforming to the expansion of the powers of the governing authorities in methods of surveillance, this sets a restriction on the degree to which the public will allow the limitation of their right to liberty for the sake of security. On the other hand, the goal of integrating the AFIS, HANIS and eNATIS databases is reflective of the surveillance creep. Whether this will be realised will determine if the South African society is ready to draw boundaries on the limitations of their liberty.

⁶²¹ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁶²² Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill meeting on 20 January 2009 – briefing by Deputy Minister of DoJ. Minutes available at www.pmg.org.za

⁶²³ Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁶²⁴ Ibid

6.4 Methods of sample collection

The classification of the types of samples allowed to be collected for DNA analysis was a topic of much controversy, although this was only relevant in the meetings of the Ad Hoc Committee. Despite objections from the various interested parties, the SAPS and DoJ defended the choice of non-intimate samples for collection by indicating that these conform with international practices, and by demonstrating the procedures for obtaining these samples.⁶²⁵ Buccal swabs and blood finger pricks are not considered invasive in most jurisdictions and are used in just about all of the countries described earlier.⁶²⁶ These procedures of sample collection are relatively simple and easily taught.⁶²⁷ Further motivation for the retention of these classifications relate to the DNA analysis technique and the requirements of the nature of the samples for the generation of a decent profile. The samples listed in the definitions are suitable for DNA analysis and the convenience of collection of buccal swabs and blood finger pricks should be monopolised so that the procedure can be fast-tracked.⁶²⁸ For these reasons, I agree with the Ad Hoc Committee's decision to retain the definitions in their original form.

The more practical issues discussed concerning the methods of sample collection raised some valid points although logical solutions to these problems can be employed. Concerns about the ability of police officers to collect DNA samples and fingerprints are relevant.⁶²⁹ However, this can be addressed by means of training and the construction of restrictions limiting the performance of the procedures to qualified personnel.⁶³⁰ Sensitivity training would also be useful as incidents of police callousness have been reported.⁶³¹ The suggestion to delegate this responsibility to medical practitioners is thus, unnecessary and would be costly and time-consuming, as was pointed out by the DoJ.⁶³²

After collection, it is of significant importance that the integrity of the sample is maintained and consultation with forensic technicians would be useful in determining how this could be

⁶²⁵ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁶²⁶ Ibid

⁶²⁷ Ibid

⁶²⁸ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

⁶²⁹ M Shaw 'The politics of police change' in *Crime and Policing in Post-Apartheid South Africa* (2001)

⁶³⁰ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

⁶³¹ M Shaw 'The politics of police change' in *Crime and Policing in Post-Apartheid South Africa* (2001)

⁶³² Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 10 February 2009 – response to public submissions. Minutes available at www.pmg.org.za

achieved.⁶³³ The choice of which type of sample to collect will differ in different situations for integrity reasons and although buccal swabs are sufficient for analysis due to the development of modern techniques of extraction which only require as little as one nanogram (one billionth of a gram) of tissue, other factors need to be considered as well.⁶³⁴ The integrity of the sample could be affected by a number of parameters such as time, temperature and proximity or contact with other chemicals.⁶³⁵ Since maintaining sample integrity is vital, the best type of sample for a particular situation or area should be determined. In South Africa, one of the major obstacles facing the maintenance of sample integrity is getting the samples from the point of collection to the laboratories able to analyse them.⁶³⁶ Technical experts should be consulted in order to determine the best procedures to maximise sample preservation. This information will be helpful in finalising legislation, training procedures and implementation strategies.

While effective training programmes may be constructed and put into operation successfully, having police officials collect non-intimate samples may still be problematic due to the nature of DNA evidence and its importance in the criminal justice process. DNA evidence can easily be destroyed, contaminated and even planted,⁶³⁷ especially with the latest technology allowing for samples to be lifted from items that have been touched, containers that have been sipped from and cigarette butts. The level of police corruption in South Africa is relatively high⁶³⁸ and as was mentioned in Chapter 5, this was a point of concern for a number of public parties. Misconduct by the police in this field has already been observed in South Africa, making this a valid consideration for legislators. Particular high profile cases involving police misconduct in the forensic investigations include the murder of Inge Lotz in Stellenbosch and the murder of mining magnate Brett Kebble. In the Lotz case, the victim's boyfriend, Fred van der Vyver, was arrested for her murder on the grounds of his fingerprint being found at the scene, his footprint being left in a bloody smear and his ornamental hammer being used as the weapon.⁶³⁹ International forensic experts testified that the fingerprint had not been lifted from the supposed location and had

⁶³³ I Freckelton 'DNA profiling: forensic science under the microscope' (1990) 14 *Criminal Law Journal* 23

⁶³⁴ L Meintjes-van der Walt 'An overview of the use of DNA evidence in South African criminal courts' (2008) 1 *SACJ* 22

⁶³⁵ Ibid

⁶³⁶ B Omar 'Are we taking physical evidence seriously? The SAPS Criminal Record and Forensic Science Service' (2008) 23 *SA Crime Quarterly* 29

⁶³⁷ PC Gianelli 'The abuse of scientific evidence in criminal cases: The need for independent crime laboratories' (1996-1997) 4 *Virginia Journal of Social Policy and the Law* 439

⁶³⁸ A Faull 'Corruption and the South African Police Service. A review and its implications' (2007) ISS Paper 150

⁶³⁹ Carte Blanche 14 September 2008, Available at <http://beta.mnet.co.za/carteblanche/Article.aspx?Id=3572>, accessed on 6 July 2009

probably been deliberately misfiled.⁶⁴⁰ The theory of the shoe-print was also thought unlikely and the supposed murder weapon did not forensically match the wounds found on the victim.⁶⁴¹ The Kebble case was slightly different in that the police were accused of deliberately destroying evidence by failing to secure the crime scene rather than fabricating and manipulating evidence.⁶⁴² The connection of former National Police Commissioner, Jackie Selebi to the suspect caused the victim's lawyer to become sceptical about the quality of the investigation and accused the police of misconduct after analysing their work.⁶⁴³ These cases illustrate that police have an interest in solving crimes quickly (the Lotz case), especially when the case is of a high profile, but they may also have an interest in preventing the solution of the crime, as in the Kebble case. The pressure of the public in demanding an effective CJS and the consequent war-on-crime manifest themselves in these areas of corruption.

These examples emphasize the importance of establishing adequate safeguards against corruption and the Ad Hoc Committee's decision to include additional provisions criminalising the fabrication or intentional exclusion of forensic evidence were satisfactory. The Portfolio Committee on Police did not consider this possibility but future considerations would do well to consider this issue.

A final issue of interest in the realm of sample collection is the inclusion of the paragraph regulating the use of biometric technology such as the morpho touch technology as discussed in the meetings of the Ad Hoc Committee.⁶⁴⁴ It is interesting that the Portfolio Committee did not broach this subject especially considering their singular focus on the finger printing provisions of the Bill. This provision was a request by the SAPS and it is surprising that it was not brought up in the Portfolio Committee meetings. The Morpho Touch technology allows for on the spot scans of an individual's fingerprint and comparison with the AFIS database to establish whether the individual is connected to a crime scene.⁶⁴⁵ This increases the chances of catching wanted persons and is an effective tool for the success of the investigative division of the criminal justice system. This technology is another illustration of the increasing reliance on criminal intelligence in the war

⁶⁴⁰ Ibid

⁶⁴¹ Ibid

⁶⁴² 'Cops "sabotaged Kebble probe"' News24, 25 July 2008. Available at http://www.news24.com/Content/SouthAfrica/News/1059/9de7b920691a4ebbb242ae41e6ef939e/25-07-2008-10-10/Cops_sabotaged_Kebble_probe, accessed on 6 July 2009

⁶⁴³ Ibid

⁶⁴⁴ Meeting of the Ad Hoc Committee on Criminal Law (Forensic Procedures) Amendment Bill on 11 February 2009 – proposed amendments. Minutes available at www.pmg.org.za

⁶⁴⁵ 'Making it even more difficult for criminals: AFIS and morphotouch go operational' Available at <http://www.info.gov.za/speeches/index.htm>

on the crime and the increased tolerance for invasion of liberty as discussed earlier. The situations in which these technologies are applied may become points of controversy and developments in the construction of limitations to these invasions of rights and freedoms will be occurrences to look out for in studies of risk perceptions.

6.5 Database management and safeguards against misuse of information

The management of all the databases including AFIS, NDDSA, HANIS and eNATIS and the regulations around access and their maintenance is an important aspect of the Bill. Debates about the institutions governing their operation are vital for establishing an accountable system. Whether the database is under the governance of the SAPS or the governance of an independent, neutral party is relevant for reasons of corruption, privacy and state centrality. While some jurisdictions have commissioned the database to be in the care of an institution independent of the police for objectivity reasons, the impartial execution of procedures can be achieved by other means. Inclusion of safeguards in the legislation as well as in a physical sense could limit the chances of corruption and protect privacy rights. An additional mechanism for this purpose would be the establishment of an independent oversight body responsible for the monitoring of the activities of the procedures. This has the advantage of addressing other aspects of the procedure such as ethics, accuracy and efficiency.⁶⁴⁶ The suggestion by the SAHRC for the establishment of this group and the Ad Hoc Committees acceptance of this proposal should be considered by the Portfolio Committee on Police in their upcoming deliberations.

However, the role of this body would have to be clearly defined, especially in light of the objections by POPCRU to the outsourcing of any forensic procedures. POPCRU is a trade union which organises members of the police, correctional services and the traffic department in South Africa.⁶⁴⁷ The rationale behind their submission is illustrative of an attempt to retain the powers of the state within the state. This feeds into the bigger debate of whether the current trend towards a multi-lateralized police force relying on outside institutions for the fulfilment of their duties is desirable or whether the state should maintain control over all governance functions.⁶⁴⁸ In the case in question, trying to maintain state centrality (as lobbied for by POPCRU) could be detrimental to the functionality of the SAPS as staff shortages and poor funding have limited the amount of work

⁶⁴⁶ V Lynch and C Hancock 'DNA: The 21st Century Detective' (2009) 5 *Criminal Justice Initiative Occasional Paper Series*

⁶⁴⁷ <http://www.popcru.org.za/home.php>, accessed January 2010

⁶⁴⁸ I Loader and N Walker 'Necessary Virtues: The legitimate place of the state in the production of security' in J Wood and B Dupont (eds) *Democracy, society and the governance of security* (2006)

that can be processed by the police.⁶⁴⁹ Outsourcing of certain functions would have to be employed to achieve an adequately functioning criminal intelligence division in the criminal justice system. This can be regulated by operational restrictions and guidelines.⁶⁵⁰ The generating of documents governing these processes would be desirable and oversight by an independent body (as described in the previous paragraph) would be beneficial in ensuring cooperation and smooth functioning of these practices. Safeguards against misconduct would be essential in these mechanisms.

The adequacy of the safeguards in the Bill with regard to these matters as well as others were deliberated by both committees with the final decisions being similar on both occasions. It was agreed that the safeguards addressed the seriousness of the matter of misuse of information and that access to the databases was sufficiently limited. However, the practical limitations of access were felt to need further consideration - this was one of the issues that the Portfolio Committee on Police identified as needing more extensive collaborative planning.⁶⁵¹ The recognition of the role of practical safeguards in ensuring cooperation is welcomed and it is my feeling that if these can be developed adequately, the safeguards in the Bill will serve as sufficient measures to prevent the misuse of information.

6.6 Children's rights

The identification of various infringements on the rights of children in the original draft of the Bill has caused the State Law Advisors to reconsider the provisions relating to children.⁶⁵² As such, the Portfolio Committee on Police held a meeting with the DoJ on the components of the Child Justice Act and how these would affect the Bill.⁶⁵³ This move was a good one in terms of establishing the correct manner in which to deal with the issue of children's rights and the State Law Advisors were instructed to amend the Bill accordingly.⁶⁵⁴ The main alteration will comprise an inclusion of a provision stating that a parent or social worker needs to be present when taking the fingerprints

⁶⁴⁹ Submission by the DNA Project for the Ad Hoc Committee of the Criminal Law (Forensic Procedures) Amendment Bill. 3 February 2009

⁶⁵⁰ Ibid

⁶⁵¹ Meeting of the Portfolio Committee of Police on 11 November 2009 – implementation plan. Minutes available at www.pmg.org.za

⁶⁵² Meeting of the Portfolio Committee of Police on 17 November 2009 – deliberations. Minutes available at www.pmg.org.za

⁶⁵³ Meeting of the Portfolio Committee of Police on 18 November 2009 – Child Justice Act briefing. Minutes available at www.pmg.org.za

⁶⁵⁴ Ibid

of a child.⁶⁵⁵ Although finger printing is not necessarily an invasive or harmful procedure, it is vital that the legislation is consistent with existing provisions. These matters will have to be reconsidered in the deliberations of the DNA related section of the Bill.

CHAPTER 7: CONCLUSION

The drafting, revision, public hearings and passage through the Portfolio Committee and Parliament of the Criminal Law (Forensic Procedures) Amendment Bill has proven to be a very complicated process due to the identification of a number of controversial issues by interested parties. Despite the trend towards increased tolerance for limitations of liberty for the sake of safety as was a characteristic of the risk society, South African officials have struggled to draw the line between these two objectives. The importance of establishing a secure society and the utilisation of globally accepted mechanisms to achieve this was deemed the most relevant justification for the implementation of this piece of legislation to the extent that the ethical difficulties associated with the techniques would not be a factor in the deliberations of the Bill. The surprising delay in the processing of the Bill and the intensity of the debates around these issues is a matter not only of sociological and societal relevance but also of legal, criminological, policing and security significance.

⁶⁵⁵ Ibid

The provisions of controversy had implications of intrusions on rights to privacy, equality, human dignity, rights of arrested persons and children's rights all of which needed to be balanced against the justification of the provisions to provide for the safety of society. These provisions included inter alia the instruction of the compulsory taking of fingerprints and DNA samples from all arrested persons; the provision allowing the collection of DNA samples and fingerprints from a suspected person or simply when it is believed that these will be of value in an investigation; the indefinite retention period of fingerprints, body prints, photographs, DNA samples and DNA profiles unless an individual is not convicted in a court of law in which case the retention period is five years; the methods of sample collection; the management of the fingerprint and DNA databases with regards to issues like oversight, access and utilisation; and finally, the catering in the legislation for the inclusion of children's rights. Many of these provisions, as discussed, are included in legislation in other jurisdictions were included in the deliberations in the South African case but the decisions reached were often not as liberal as provided for in the legislation from other parts of the world. The centrality of the Bill of Rights in the South African Constitution due to the political history experienced in South Africa could be a contributing factor towards a more intense consideration of ethical boundaries and the possibilities of misconduct. The potential for the 'surveillance creep' to escalate in a manner that would result in the establishment of a 'police state' (as postulated by Murnaghan) would be especially concerning for South Africa in light of its own authoritarian past.

Taking into consideration the social situation and related needs of the South African public, the government's approach to the fight against crime, the scientific principles behind the forensic procedures, international practices in this regard and the criminological phenomena having relevance in this respect, the following recommendations can be made for the finalisation of the Bill. Compulsory taking of fingerprints and collection of DNA samples should be limited to those arrested for Schedule 1 offences with the National Commissioner of the SAPS having the discretion to include other offences in this provision. The retention period for fingerprints and DNA profiles can remain as it stands in the draft of the Bill with these set as indefinite for convicted offenders and five years for individuals not convicted of an offence. The destruction of DNA samples immediately after a DNA profile has been extracted should be instructed in the Bill. Police officials should be authorised to take fingerprints and collect DNA samples although training must be a priority in this regard and forensic experts should be consulted on the best type of sample suited for particular situations. As for the management of the databases, SAPS should be authorised to create, maintain and safeguard AFIS and the NDDSA but safeguards against the

misuse of information and corruption are of vital importance in the Bill. The authority for the SAPS to access HANIS and eNATIS is a valid provision although this should be limited to a request system and only until a time where the AFIS database is sufficient for criminal investigations. Finally, the establishment of an independent oversight body to monitor the processes associated with the procedures described in the Bill should be included as a provision in the Bill so as to ensure the appropriate operation of this very valuable aspect of the criminal justice system.

Overall, the Bill has the potential to be very influential in the improvement of the criminal investigative capacity of the South African criminal justice system. The focus on the capability of the SAPS and other departments to implement the legislation should count significantly towards the success of this aim. However, it is important that the relevant stakeholders realise that the solution to the reformation of the criminal justice system cannot be pinned solely on this piece of legislation. The format of the Bill in its finalised form and the implications of the legislation once it has been passed will be interesting to observe for reasons related to developments in the social aspect of the risk society and the nature of this in the South African context. Whether this will prove to be a dominant weapon in the 'war on crime' causing a new approach to crime management strategies or whether the forensic field will take on a different role remains to be seen.

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REPUBLIC OF SOUTH AFRICA

CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 31759 of 29 December 2008)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

No. of copies printed 1 800

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Criminal Procedure Act, 1977, so as to further regulate powers in respect of the ascertainment of bodily features of persons; to provide for the compulsory taking of finger-prints of certain categories of persons; to provide for the taking of prints and samples for investigative purposes; to provide for the taking of specified bodily substances from certain categories of persons for the purposes of DNA analysis; to provide that prints and samples taken under the Act are retained; to further regulate proof of certain facts by affidavit or certificate; to further regulate evidence of prints or bodily features of accused; to amend the South African Police Service Act, 1995, so as to regulate the storing and use of finger-prints, palm-prints, foot-prints and photographs of certain categories of persons; and to establish and regulate the administration and maintenance of the National DNA Database of South Africa; to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of bodyprints and bodily samples; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of prints and samples for investigation purposes; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Substitution of heading of Chapter 3 of Act 51 of 1977, as amended by section 1 of Act 64 of 1982

1. The following heading is hereby substituted for the heading of Chapter 3 of the Criminal Procedure Act, 1977: 5

“ASCERTAINMENT OF BODILY FEATURES OF PERSONS”.

Insertion of sections 36A, 36B and 36C in Chapter 3 of Act 51 of 1977

2. The following sections are hereby inserted in the Criminal Procedure Act, 1977, after section 36: 10

“Interpretation of Chapter 3

36A. (1) For the purposes of this Chapter, unless the context indicates otherwise—

- | | |
|--|----|
| (a) ‘ authorised person ’ means in reference to— | |
| (i) photographic images, finger-prints or body-prints, any police official in the performance of his or her official duties; or | 5 |
| (ii) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate; | |
| (b) ‘ body-prints ’ means prints taken from a person’s ear, foot, nose, palm or toes; | 10 |
| (c) ‘ child ’ means a person under the age of 18 years; | |
| (d) ‘ DNA ’ means deoxyribonucleic acid; | |
| (e) ‘ DNA analysis ’ means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance; | 15 |
| (f) ‘ DNA profile ’ means the results of forensic DNA analysis of an intimate sample, a non-intimate sample or any other bodily substance; | |
| (g) ‘ intimate sample ’ means a sample of blood other than a blood finger prick; | 20 |
| (h) ‘ NDDSA ’ means the National DNA Database of South Africa, established in terms of section 15F of the South African Police Service Act; | |
| (i) ‘ non-intimate sample ’ means— | 25 |
| (i) a sample of hair other than pubic hair; | |
| (ii) a sample taken from a nail or from under a nail; | |
| (iii) a swab taken from the mouth (buccal swab); | |
| (iv) a blood finger prick; or | |
| (v) a combination of these; | |
| (j) ‘ South African Police Service Act ’ means the South African Police Service Act, 1995 (Act No. 68 of 1995); and | 30 |
| (k) ‘ speculative search ’ means that the body-prints, finger-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples taken, under any power conferred by this Chapter, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against— | 35 |
| (i) in the case of photographic images, body-prints or finger-prints, the databases of the South African Police Service, the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this Act; or | 40 |
| (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, the NDDSA. | 45 |

(2) For the purposes of this Chapter, unless the context indicates otherwise, any reference to a ‘person’ includes a ‘child’.

Powers in respect of finger-prints and non-intimate samples of accused and convicted persons 50

36B. (1) A police official must—

- | | |
|---|----|
| (a) take the finger-prints or must cause such prints to be taken of any— | |
| (i) person arrested upon any charge; | |
| (ii) person released on bail or on warning under section 72, if such person’s finger-prints were not taken upon arrest; | 55 |

- (iii) person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; 5
- (iv) person convicted by a court and sentenced to—
(aa) a term of imprisonment, whether suspended or not; or
(bb) any non-custodial sentence, if a non-intimate sample was not taken upon arrest; 10
- (v) person convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph; or
- (vi) person deemed under section 57(6) to have been convicted in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph; 15
- (b) take a non-intimate sample or must cause such sample to be taken of any—
 - (i) person arrested upon any charge;
 - (ii) person released on bail or on warning under section 72, if a non-intimate sample was not taken upon arrest; 20
 - (iii) person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; 25
 - (iv) person convicted by a court and sentenced to—
(aa) a term of imprisonment, whether suspended or not; or
(bb) any non-custodial sentence, if a non-intimate sample was not taken upon arrest; 30
 - (v) person convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph; or
 - (vi) person deemed under section 57(6) to have been convicted in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph. 35
- (2) (a) The finger-prints taken in terms of subsection (1)(a) must be stored on the finger-print database maintained by the South African Police Service as provided for in Chapter 5A of the South African Police Service Act. 40
- (b) A police official must immediately furnish each non-intimate sample taken under subsection (1)(b) to the National Commissioner of the South African Police Service or his or her delegate, who shall carry out a DNA analysis on each such sample in terms of Chapter 5B of the South African Police Service Act, and include the results in the NDDSA. 45
- (3) Nothing in this Chapter shall prohibit a police official from re-taking the finger-prints of any person referred to in subsection (1), if—
 - (a) the finger-prints taken on the previous occasion do not constitute a complete set of his or her finger-prints; or 50
 - (b) some or all of the finger-prints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching.
- (4) Nothing in this Chapter shall prohibit a police official from re-taking a non-intimate sample from any person referred to in subsection (1), if the non-intimate sample taken from him or her was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient. 55
- (5) The finger-prints, non-intimate samples or the information derived from such samples, taken under any power conferred by this section, may be the subject of a speculative search. 60
- (6) (a) Subject to paragraph (b), the finger-prints, non-intimate samples or the information derived from such samples, taken under any power

conferred by this section, must be retained after it has fulfilled the purposes

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for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Nothing in paragraph (a) shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any finger-prints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.

(c) Any person who uses or who allows the use of the finger-prints, non-intimate samples or the information derived from such samples as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(7) Paragraphs (a)(iv) and (b)(iv) of subsection (1) apply to any person convicted of any crime, irrespective of sentence, including—

(a) any person serving such a sentence at the time of the commencement of this section; and

(b) where applicable, any person released on parole in respect of such a sentence, irrespective of the fact that such a person was convicted of the offence in question, prior to the commencement of this section.

(8) Despite subsection (6)(a), the finger-prints, non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.

Body-prints and samples for investigation purposes

36C. (1) Any police official may without a warrant take finger-prints, body-prints and non-intimate samples of a person or a group of persons, if there are reasonable grounds to—

(a) suspect that the person or that one or more of the persons in that group has committed an offence; and

(b) believe that the prints or samples or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of the persons as possible perpetrators of the offence.

(2) The person who has control over prints or samples taken in terms of this section may—

(a) examine them for the purposes of the investigation of the relevant offence or cause them to be so examined; and

(b) cause any prints, non-intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search.

(3) (a) The finger-prints, body-prints or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Any person who uses or who allows the use of the finger-prints, body-prints, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(c) The finger-prints and body-prints referred to in paragraph (a) must be stored by the Division: Criminal Record and Forensic Science Service of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act.

(d) The non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South

African Police Service Act.

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(4) Despite subsection (3)(a), the finger-prints, body-prints, non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.”.

Amendment of section 37 of Act 51 of 1977, as amended by section 1 of Act 64 of 1982

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3. The following section is hereby substituted for section 37 of the Criminal Procedure Act, 1977:

“Powers in respect of prints and bodily appearance of accused and convicted persons

- 37.** (1) Any police official may— 10
- (a) take the **[finger-prints, palm-prints or foot-prints]** body-prints or may cause any such prints to be taken—
- (i) of any person arrested upon any charge;
 - (ii) of any such person released on bail or on warning under section 72; 15
 - (iii) of any person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of section 40(1);
 - (iv) of any person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or 20
 - (v) of any person convicted by a court; or
 - (vi) of any person deemed under section 57(6) to have been convicted in respect of any offence which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph; 25
- (b) make a person referred to in paragraph (a)(i) or (ii) or paragraph (a)(i) or (ii) of section 36B(1) available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine; 30
- (c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) or paragraph (a)(i) or (ii) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance: 35
- Provided that no police official shall take any **[blood]** intimate sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.
- (d) take a **[photograph]** photographic image or may cause a **[photo-graph]** photographic image to be taken of a person referred to in paragraph (a)(i) or (ii) or paragraph (a)(i) or (ii) of section 36B(1). 40
- (2) (a) Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse **[may]** must take such steps, including the taking of **[a blood]** an intimate sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) or paragraph (a)(i) or (ii) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance. 50
- (b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of **[the blood]** an intimate sample of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take **[a blood]** an intimate sample of such person or cause such sample to be taken: Provided that such sample must be taken if requested by any police official. 55

(3) Any court before which criminal proceedings are pending, may—

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- (a) in any case in which a police official is not empowered under subsection (1) or section 36B(1) to take finger-prints, **[palm-prints or foot-prints]** body-prints or a non-intimate sample or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of **[a blood]** an intimate sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;
- (b) order that the steps, including the taking of **[a blood]** an intimate sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.
- (4) Any court which has convicted any person of any offence or which has concluded a preparatory examination against any person on any charge, or any magistrate, may order that the finger-prints, **[palm-prints or foot-prints, or]** body-prints, a **[photograph]** photographic image, a non-intimate sample or an intimate sample of the person concerned be taken.
- (5) **[Finger-prints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.]** Any finger-prints, body-prints, photographic images, non-intimate samples, intimate samples or the information derived from samples taken under any power conferred by this section, may be the subject of a speculative search.
- (6) (a) Subject to subsection (7), the finger-prints, body-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, and the record of steps taken under this section must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.
- (b) Any person who uses or who allows the use of the finger-prints, body-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.
- (c) The finger-prints, body-prints and photographic images referred to in paragraph (a), must be stored by the Division: Criminal Record and Forensic Science Service of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act.
- (d) The intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act.
- (7) Nothing in subsection (6) shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any finger-prints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.
- (8) Despite subsection (6)(a), the finger-prints, body-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the

person is not convicted by a court of law”.

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Amendment of section 212 of Act 51 of 1977, as amended by section 12 of Act 56 of 1979, sections 46 and 47 of Act 97 of 1986, section 11 of Act 5 of 1991, section 40 of Act 122 of 1991, section 9 of Act 86 of 1996 and section 6 of Act 34 of 1998

4. Section 212 of the Criminal Procedure Act, 1977, is hereby amended by—

- (a) the substitution for subsection (6) of the following subsection: 5

“(6) In criminal proceedings in which the finding of or action taken in connection with any particular finger-print, **[or palm-print]** body-print, intimate sample or non-intimate sample, as defined under Chapter 3, or bodily substance is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the State and that he in the performance of his official duties— 10

- (a) found such finger-print, **[or palm-print]** body-print, intimate sample, non-intimate sample or bodily substance at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or 15

- (b) dealt with such finger-print, **[or palm-print]** body-print, intimate sample, non-intimate sample or bodily substance in the manner stated in the affidavit,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such finger-print, **[or palm-print]** body-print, intimate sample, non-intimate sample or bodily substance was so found or, as the case may be, was so dealt with.”; and 20

- (b) the substitution for subsection (8)(a) of the following subsection:

“(8) (a) In criminal proceedings in which the receipt, custody, packing, marking, delivery or despatch of any finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue (as defined in section 1 of the Anatomical Donations and Post-Mortem Examinations Act, 1970 (Act 24 of 1970)), intimate sample or non-intimate sample, as defined under Chapter 3, or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges— 25

- (i) that he is in the service of the State or is in the service of or is attached to the South African Institute for Medical Research, any university in the Republic or any body designated by the Minister under subsection (4); 30 35

- (ii) that he in the performance of his official duties—

- (aa) received from any person, institute, State department or body specified in the affidavit, a finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue, intimate sample or non-intimate sample, as defined under Chapter 3, or object described in the affidavit, which was packed or marked or, as the case may be, which he packed or marked in the manner described in the affidavit; 40

- (bb) delivered or despatched to any person, institute, State department or body specified in the affidavit, a finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue, intimate sample or non-intimate sample, as defined under Chapter 3, or object described in the affidavit, which was packed or marked or, as the case may be, which he packed or marked in the manner described in the affidavit; 45 50

- (cc) during a period specified in the affidavit, had a finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue, intimate sample or non-intimate sample, as defined under Chapter 3, or object described in the affidavit in his custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit, 55

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged: Provided that the person who may make such affidavit in any case relating to any article of clothing, specimen, **[or]** tissue, intimate sample or non-intimate sample, as defined 60

under Chapter 3, may issue a certificate in lieu of such affidavit, in which

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event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.”.

Amendment of section 225 of Act 51 of 1977

5. The following section is hereby substituted for section 225 of the Criminal Procedure Act, 1977:

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“Evidence of prints, samples or bodily appearance of accused

225. (1) Whenever it is relevant at criminal proceedings to ascertain whether any finger-print, **[palm-print or foot-print]** body-print, intimate sample, non-intimate sample or the information derived from such samples, as defined under Chapter 3, of an accused at such proceedings corresponds to any other finger-print, **[palm-print or foot-print]** body-print, intimate sample, non-intimate sample, bodily substance or the information derived from such samples or bodily substance or whether the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the finger-prints**[, palm-prints or foot-prints]** or body-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test or DNA analysis of an intimate sample or a non-intimate sample, as defined under Chapter 3, of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the finger-print, **[palm-print, or foot-print]** body-print, intimate sample or non-intimate sample in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of **[section]** sections 36B, 36C or 37, or that it was taken or ascertained against the wish or the will of the **[accused]** person concerned.”.

Insertion of Chapters 5A and 5B in Act 68 of 1995, as amended by Act 41 of 1997, Act 47 of 1997, Act 83 of 1998 and Act 40 of 2002

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6. The following Chapters are inserted in the South African Police Service Act, 1995, after section 15:

“CHAPTER 5A

STORAGE AND USE OF FINGER-PRINTS, BODY-PRINTS AND PHOTOGRAPHIC IMAGES OF PERSONS

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Storage and use of finger-prints, body-prints and photographic images

15A. (1) The National Commissioner or his or her delegate must ensure that finger-prints, body-prints and photographic images taken under—

- (a) section 36B(1)(a), section 36C(1) or section 37 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
 - (b) section 113 of the Firearms Control Act, 2000 (Act No. 60 of 2000);
 - (c) section 9 of the Explosives Act, 2003 (Act No. 15 of 2003); or
 - (d) any Order of the Department of Correctional Services,
- are stored, maintained, administered, and readily available, whether in computerised or other form, and shall be located within the Division: Criminal Record and Forensic Science Service.

(2) The National Commissioner or his or her delegate must ensure that the finger-prints and photographic images of persons whose names must be included in the National Register for Sex Offenders, as determined under section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), are taken and dealt with in

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accordance with subsection (1).

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(3) The provisions of this Chapter apply *mutatis mutandis* to the finger-prints, body-prints and photographic images stored, maintained and administered by the Division: Criminal Record and Forensic Science Service prior to the coming into operation of this Act, and nothing in this Chapter shall affect the use of such prints and photographic images for the purposes set out in subsections (4) and (5). 5

(4) Subject to subsection (5), the finger-prints, body-prints and photographic images referred to in subsections (1), (2) and (3) shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. 10

(5) Nothing in subsection (4) shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate of any finger-prints stored in terms of this section, for the purposes of establishing if a person has been convicted of an offence. 15

(6) Any person who uses or who allows the use of finger-prints, body-prints and photographic images referred to in subsection (1), for any purpose that is not related to the circumstances set out in subsections (4) and (5), is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years. 20

Speculative search against other databases

15B. (1) Any finger-prints, body-prints or photographic images stored in terms of this Chapter, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked against the databases of the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this Act. 25

(2) Any person who conducts a speculative search, as contemplated in subsection (1), for any purpose that is not related to the circumstances set out in that subsection, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years. 30

National instructions relating to collection, storage, maintenance, administration and use of finger-prints, body-prints and photographic images 35

15C. (1) The National Commissioner must, in consultation with the Minister, issue national instructions regarding all matters which are reasonably necessary or expedient to be provided for in relation to this Chapter and which must be followed by all police officials, including the following: 40

- (a) The collection of finger-prints, body-prints and the taking of photographic images;
- (b) the storage, maintenance and administration of finger-prints, body-prints and photographic images in terms of this Chapter; 45
- (c) the use of the information made available in terms of this Chapter; and
- (d) the manner in which statistics must be kept by the Division: Criminal Record and Forensic Science Services in relation to all information collected, stored and analysed in terms of this Chapter, which shall include the recording and maintaining of statistics on all exhibits collected at crime scenes. 50

(2) The National Commissioner must develop training courses in reference to the national instructions referred to in subsection (1).

(3) The police official commanding the Division: Criminal Record and Forensic Science Services within the South African Police Service, is responsible for— 55

- (a) the development, implementation and maintenance of a personal identification services strategy, to give effect to the provisions of this

Chapter and Chapter 5B; and

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- (b) the development, implementation and maintenance of systems and processes, including the required information technology infrastructure and systems, to support such a strategy.

CHAPTER 5B

ESTABLISHMENT, ADMINISTRATION AND MAINTENANCE OF NATIONAL DNA DATABASE OF SOUTH AFRICA 5

Interpretation

15D. (1) For the purposes of this Chapter, unless the context indicates otherwise—

- (a) **‘authorised person’** means the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate; 10
- (b) **‘child’** means a person under the age of 18 years;
- (c) **‘Criminal Procedure Act’** means the Criminal Procedure Act, 1977 (Act No. 51 of 1977); 15
- (d) **‘DNA’** means deoxyribonucleic acid;
- (e) **‘DNA analysis’** means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance;
- (f) **‘DNA profile’** means the results of forensic DNA analysis of an intimate sample, a non-intimate sample or any other bodily substance; 20
- (g) **‘Explosives Act’** means the Explosives Act, 2003 (Act No. 15 of 2003);
- (h) **‘Firearms Control Act’** means the Firearms Control Act, 2000 (Act No. 60 of 2000); 25
- (i) **‘intimate sample’** means a sample of blood other than a blood finger prick;
- (j) **‘NDDSA’** means the National DNA Database of South Africa, established in terms of section 15F;
- (k) **‘non-intimate sample’** means— 30
 - (i) a sample of hair other than pubic hair;
 - (ii) a sample taken from a nail or from under a nail;
 - (iii) a swab taken from the mouth (buccal swab);
 - (iv) a blood finger prick; or
 - (v) a combination of these; and 35
- (l) **‘volunteer’** means a person who freely gives his or her informed consent to the taking of an intimate sample or a non-intimate sample in accordance with section 15J.

(2) For the purposes of this Chapter, unless the context indicates otherwise, any reference to a ‘person’ includes a ‘child’.

Purpose of Chapter

15E. The purpose of this Chapter is to establish and maintain a national DNA Database, which may only be used for purposes related to the identification of missing persons, the identification of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution and not for any unauthorised purpose in order to, amongst others— 45

- (a) serve as a criminal intelligence tool in the fight against crime;
- (b) identify persons alleged to have committed offences, including those committed before the coming into operation of this Chapter; 50
- (c) where applicable, prove the innocence or guilt of accused persons; or
- (d) where applicable, identify missing persons or unidentified human remains.

Establishment of DNA Database

15F. (1) There is hereby established a national DNA Database within the South African Police Service, to be known as the National DNA Database of South Africa (NDDSA).

(2) The NDDSA, whether in computerised or other form, shall be administered and maintained by the National Commissioner or his or her delegate and shall be located within the Division: Criminal Record and Forensic Science Service.

(3) The NDDSA shall consist of the following indices:

- (a) A Crime Scene Index;
- (b) a Reference Index;
- (c) a Convicted Offenders Index;
- (d) a Volunteer Index; and
- (e) a Personnel, Contractor and Supplier Elimination Index, to be used only in the investigative repository for DNA analysis.

(4) The provisions of this Chapter apply *mutatis mutandis* to the DNA profiles stored, maintained and administered by the Division: Criminal Record and Forensic Science Service prior to the coming into operation of this Act, and nothing in this Chapter shall affect the use of such DNA profiles for the purposes set out in this Chapter.

Crime Scene Index

15G. (1) The Crime Scene Index shall contain DNA profiles, derived by means of DNA analysis, from bodily substances that are found—

- (a) at any place where an offence was, or is reasonably suspected of having been, committed;
- (b) on or within the body of the victim, or a person reasonably suspected of being a victim, of an offence;
- (c) on anything worn or carried by the victim at the time when an offence was, or is reasonably suspected of having been, committed; or
- (d) on or within the body of any person or thing, or at any place, associated with the commission of an offence.

(2) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The case number of the investigation associated with the bodily substance from which the profile was derived;
- (b) where applicable, the case number of any other investigation associated with the same DNA profile on the Crime Scene Index; and
- (c) where applicable and scientifically possible, the bodily substance used to derive the profile from.

(3) Forensic DNA analysis of bodily substances stored, in terms of subsection (2)(c), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the bodily substances, or from whom they were taken, was last derived or for any other legitimate purpose.

(4) Nothing in subsection (3) shall prohibit the re-taking of a bodily substance under the circumstances set out in subsection (1), if a bodily substance taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

Reference Index

15H. (1) The Reference Index shall contain DNA profiles, derived by means of DNA analysis, from an intimate sample or a non-intimate sample, taken under any power conferred by—

- (a) Chapter 3 of the Criminal Procedure Act;
- (b) the Firearms Control Act; or

(c) the Explosives Act,

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where such person's DNA profile does not form part of the Convicted Offenders Index.

(2) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The identity of the person from whose bodily substance the profile was derived; and
- (b) where applicable and scientifically possible, the intimate sample or the non-intimate sample used to derive the profile from.

(3) Forensic DNA analysis of samples stored, in terms of subsection (2)(b), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the samples, or from whom they were taken, was last derived or for any other legitimate purpose.

(4) Nothing in subsection (3) shall prohibit the re-taking of a sample under the circumstances set out in subsection (1), if a sample taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

Convicted Offenders Index

15I. (1) The Convicted Offenders Index shall contain DNA profiles, derived by means of DNA analysis, from an intimate sample or a non-intimate sample—

- (a) taken under any power conferred by section 36B(1)(b)(iv), (v) or (vi) of the Criminal Procedure Act; or
- (b) that was entered into the Reference Index, but such person has subsequent to the entering of his or her DNA profile on the Reference Index been convicted of an offence.

(2) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The identity of the person from whose bodily substance the profile was derived; and
- (b) where applicable and scientifically possible, the intimate sample or the non-intimate sample used to derive the profile from.

(3) Forensic DNA analysis of samples stored, in terms of subsection (2)(b), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the samples, or from whom they were taken, was last derived or for any other legitimate purpose.

(4) Nothing in subsection (3) shall prohibit the re-taking of a sample under the circumstances set out in subsection (1) if a sample taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

(5) The National Commissioner or his or her delegate must take all necessary steps to ensure that DNA profiles of persons whose names must be included in the National Register for Sex Offenders, as determined under section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), are loaded onto the Convicted Offenders Index.

Volunteer Index

15J. (1) (a) The Volunteer Index shall contain DNA profiles, derived by means of DNA analysis, from an intimate sample or a non-intimate sample, taken from a person with his or her informed consent.

(b) If the volunteer is a child, a sample may only be taken for the purposes of paragraph (a), with the informed consent of the child's parent

or guardian.

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(c) Any police official may take a non-intimate sample for the purposes of paragraph (a), but an intimate sample may only be taken by a registered medical practitioner or a registered nurse.

(2) For the purposes of this section, informed consent means that the volunteer consents, in writing, to the taking of an intimate or a non-intimate sample, after a police official has informed him or her of the following:

- (a) The way in which the intimate sample or non-intimate sample is to be taken;
- (b) that the volunteer is under no obligation to give a sample;
- (c) that the sample or the DNA profile derived from it may produce evidence that might be used in a court of law;
- (d) that the consent given under this section cannot be withdrawn;
- (e) that the sample taken under this section, the DNA profile derived from it or any other information obtained from the analysis of such sample will be retained on the NDDSA, together with the identity of the person, in accordance with this Chapter; and
- (f) that the sample taken under this section, the DNA profile derived from it or any other information stored on or within or associated with the NDDSA, may only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(3) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The identity of the person from whose bodily substance the profile was derived; and
- (b) where applicable and scientifically possible, the intimate sample or the non-intimate sample used to derive the profile from.

(4) Forensic DNA analysis of samples stored, in terms of subsection (3)(b), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the samples, or from whom they were taken, was last derived or for any other legitimate purpose.

(5) Nothing in subsection (4) shall prohibit the re-taking of a sample under the circumstances set out in subsection (1) if a sample taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

(6) Notwithstanding subsection (2)(d), a child, unless found guilty by a court of law, may upon reaching majority apply to a court of law to have his or her consent contemplated in that subsection withdrawn.

Personnel, Contractor and Supplier Elimination Index

15K. (1) The Personnel, Contractor and Supplier Elimination Index shall contain DNA profiles derived, by means of DNA analysis, from a non-intimate sample of—

- (a) a police official, who may, due to the nature of his or her official duties in relation to a crime scene, have contaminated any bodily substance to be analysed in terms of this Chapter;
- (b) a police official or any other person, who may, due to the nature of his or her official duties in the conduct of forensic procedures under this Chapter, have contaminated any substance or process to which this Chapter is applicable;
- (c) any person directly involved in the manufacture of consumables, equipment, utensils or reagents used in the DNA analysis process; or
- (d) any person who is responsible for the maintenance of DNA equipment.

(2) (a) A non-intimate sample may only be taken from a person mentioned under subsection (1) with his or her written consent.

(b) Any police official may take a non-intimate sample for the purposes

of paragraph (a).

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(3) The Personnel, Contractor and Supplier Elimination Index may only be used for elimination purposes and forms part of the administration of the NDDSA.

(4) Nothing in this section shall prohibit the taking of an intimate or a non-intimate sample from any person, mentioned under subsection (1), in terms of Chapter 3 of the Criminal Procedure Act.

Speculative DNA search and communication of information

15L. (1) The National Commissioner or his or her delegate or an authorised person shall compare any DNA profile that is entered in the Crime Scene Index, Reference Index, Convicted Offenders Index or the Volunteer Index with those DNA profiles that are already contained in the NDDSA, and may then for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, communicate the following information:

(a) If the DNA profile is not already contained in the NDDSA, the fact that it is not; or

(b) if the DNA profile is already contained in the NDDSA, all the information contained in the NDDSA in relation to that DNA profile.

(2) The information referred to in subsection (1) may only be communicated in the circumstances set out in that subsection and may only be communicated to—

(a) a police official;

(b) a prosecutor;

(c) a judge;

(d) a magistrate;

(e) a court; or

(f) for criminal defence purposes, an accused person, or where the accused is a child to his or her parent or guardian, or his or her legal representative.

(3) Nothing in this Chapter shall prohibit the National Commissioner or his or her delegate or an authorised person to compare a DNA profile, derived by means of DNA analysis from an intimate sample or a non-intimate sample of persons who are missing, with the DNA profiles that are already contained in the NDDSA, for purposes related to the investigation of missing persons.

(4) Nothing in this Chapter shall prohibit the National Commissioner or his or her delegate or an authorised person to make use of DNA analysis to identify unidentified human remains.

Foreign law enforcement agencies

15M. (1) Subject to subsection (3), the National Commissioner or his or her delegate may, on receipt of a DNA profile from a foreign state, compare the profile with those in the NDDSA, for purposes related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution, and may then communicate the following information:

(a) If the DNA profile is not contained in the NDDSA, the fact that it is not; or

(b) if the DNA profile is contained in the NDDSA, all the information that the National Commissioner or his or her delegate considers appropriate, as contained in the NDDSA in relation to that DNA profile.

(2) Subject to subsection (3), the National Commissioner or his or her delegate may, on the request of an investigating officer, for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, communicate a DNA profile contained in the Crime Scene Index to a foreign state.

(3) Any steps taken under subsection (1) or (2), other than requests relating to missing persons or unidentified human remains that do not relate

to the detection of crime, the investigation of an offender or the conduction

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of a prosecution, must be in accordance with the provisions of the International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996), or, where applicable, in terms of an existing Treaty.

Compliance with Quality Management System

- 15N.** (1) The National Commissioner or his or her delegate must develop recommended standards for quality assurance, including standards for testing the proficiency of forensic science laboratories and forensic analysts in conducting analysis of DNA. 5
- (2) The standards referred to in subsection (1) must—
- (a) specify criteria for quality assurance and proficiency tests to be applied to the various types of DNA analysis used by forensic laboratories; and 10
 - (b) include a system for grading proficiency testing performance to determine whether a laboratory is performing acceptably.
- (3) Any privately operated forensic science laboratory that performs any DNA analysis, for the purposes of this Chapter, pursuant to a contract with the State, must comply with the quality assurance standards developed in accordance with subsection (1) and any other requirements, such as confidentiality requirements, specified by the National Commissioner or his or her delegate. 15
- (4) Any person who—
- (a) contravenes any confidentiality requirements, as contemplated in subsection (3); or
 - (b) uses or communicates any information obtained as a result of any DNA analysis performed pursuant to a contract with the State, in a manner that is not envisaged in such a contract, 20
- is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 15 years. 25

Retention, storage and destruction of samples and DNA profiles

- 15O.** (1) (a) Subject to paragraph (c), any bodily substance or intimate sample or non-intimate sample used to populate the NDDSA with DNA profiles may, if scientifically possible, be retained after it has fulfilled the purposes for which it was taken or analysed. 30
- (b) The National Commissioner or his or her delegate must ensure the safe storage of such retained samples and must develop guidelines for the safe storage and destruction, where applicable, of retained samples. 35
- (c) An authorised person may at any time destroy any of the stored bodily substances or intimate samples or non-intimate samples, in accordance with the guidelines set out in paragraph (b), if such samples are no longer suitable or required for the purposes of forensic DNA analysis. 40
- (d) A register must be kept, by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any stored bodily substances or intimate samples or non-intimate samples destroyed in accordance with paragraph (c), and such register must be submitted to the Minister and the National Commissioner on a monthly basis. 45
- (2) (a) Subject to paragraph (b), no DNA profile loaded onto the NDDSA may be destroyed.
- (b) Nothing in subparagraph (a) prohibits the updating of any DNA profile at a later stage, which may include the substitution of a DNA profile with an updated profile. 50
- (3) Any bodily substance, intimate sample, non-intimate sample, DNA profile or any information stored on or within or associated with the NDDSA may only be used in accordance with section 15L, or by an authorised person for purposes related to, the investigation of missing persons, the investigation of unidentified human remains, the detection of 55

crime, the investigation of an offence or the conduct of a prosecution.

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(4) Despite subsection (1)(a), any bodily substance or intimate sample or non-intimate sample shall be destroyed after five years, if the person is not convicted by a court of law.

Offences and penalties

- 15P.** Any person who— 5
- (a) accesses or uses the NDDSA, or who enables another person to access or use the NDDSA, for any purposes not related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution; 10
 - (b) intentionally communicates any information that is contained in the NDDSA or allows such information to be communicated, in circumstances not related to the administration of the NDDSA, or in contravention of sections 15L and 15M; 15
 - (c) intentionally communicates the information referred to in section 15L(1) to any person or institution other than those listed in section 15L(2); 15
 - (d) knowingly and without authorisation, obtains or uses any information stored on or in the NDDSA; 20
 - (e) apart from the National Commissioner, is not an “authorised person” for the purposes of this Chapter and who performs any function in terms of this Chapter that is reserved to only be performed by an authorised person; or 20
 - (f) intentionally or recklessly stores a DNA profile on the NDDSA, in circumstances not authorised under this Chapter, 25
- is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

National instructions relating to collection, storage and use of DNA evidence

- 15Q.** (1) The National Commissioner must, in consultation with the Minister, issue national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials, in particular those who are tasked with the collection of bodily substances from a crime scene or the taking of non-intimate samples, or who must take such steps as deemed necessary in order to have an intimate sample taken, or who are authorised under this Chapter to conduct a speculative DNA search, in order to achieve the objects of this Chapter as set out in section 15E, including the following: 30
- (a) The manner in which to secure a crime scene for the purposes of collecting bodily substances; 35
 - (b) the manner in which to identify and collect bodily substances from a crime scene; 40
 - (c) the manner in which to take non-intimate samples as provided for in Chapter 3 of the Criminal Procedure Act; 45
 - (d) the manner in which to safely preserve and ensure timely transfer of collected samples to the forensic science laboratories; 45
 - (e) the manner in which to conduct speculative DNA searches, in accordance with section 15L of this Chapter; 50
 - (f) the manner in which to communicate or request DNA profiles and information in accordance with section 15M of this Chapter; 50
 - (g) the manner in which the investigative repository for DNA analysis in the Forensic Science Laboratories of the South African Police Service should operate; 50
 - (h) the manner in which to request access to information stored on the NDDSA; 55

- (i) the manner in which the information provided under this Chapter may be used for purposes related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution; and 5
 - (j) the manner in which statistics must be kept by the Division: Criminal Record and Forensic Science Services in relation to all information collected, stored and analysed in terms of this Chapter, which shall include the recording and maintaining of statistics on all exhibits collected at crime scenes. 10
- (2) The National Commissioner must develop training courses in reference to the national instructions referred to in subsection (1).
- (3) The National Commissioner or his or her delegate must develop and maintain adequate information technology infrastructure and systems to support the efficient analysis of DNA samples and speculative searches against the NDDSA. 15
- (4) The national instructions contemplated in this section, must be tabled in Parliament within three months after the commencement of this section. 15

Regulations

- 15R.** (1) The Minister may make regulations regarding— 20
- (a) any matter which is required or permitted by this Chapter to be prescribed; or
 - (b) any administrative or procedural matter necessary or expedient to give effect to the provisions of this Chapter. 25
- (2) A regulation made under subsection (1) may prescribe a penalty of a fine or a period of imprisonment for any contravention thereof or failure to comply therewith. 25

Report to Parliament

- 15S.** The National Commissioner must—
- (a) within three months after the end of each financial year, submit to the Minister a written report on the operations of the NDDSA for the year, which report shall be tabled in Parliament by the Minister within 14 days after receipt thereof or, if Parliament is not in session, to the Speaker of Parliament; and 30
 - (b) at any time when requested to do so by the Minister or duly authorised Parliamentary Committee, submit a report on the operations of the NDDSA to the Minister or that Committee.”. 35

Amendment of section 1 of Act 60 of 2000, as amended by section 1 of Act 28 of 2006

7. Section 1 of the Firearms Control Act, 2000, is hereby amended by—
- (a) the insertion after the definition of “Appeal Board” of the following definitions: 40
 - “**‘authorised person’** means in reference to—
 - (a) finger-prints, any police official in the performance of his or her official duties; or
 - (b) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate; 45
 - ‘bodyprints’** means prints taken from a person’s ear, foot, nose, palm or toes.”;
 - (b) the insertion after the definition of “Designated Firearms Officer” of the following definitions: 50
 - “**‘DNA’** means deoxyribonucleic acid;
 - ‘DNA analysis’** means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other

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- (c) the insertion after the definition of “imitation firearm” of the following definition:
 “**‘intimate sample’** means a sample of blood other than a blood finger prick;”;
- (d) the insertion after the definition of “National Commissioner” of the following definitions:
 “**‘NDDSA’** means the National DNA Database of South Africa, established in terms of section 15F of the South African Police Service Act, 1995 (Act No. 68 of 1995);
 ‘non-intimate sample’ means—
 (a) a sample of hair other than pubic hair;
 (b) a sample taken from a nail or from under a nail;
 (c) a swab taken from the mouth (buccal swab);
 (d) a blood finger prick; or
 (e) a combination of these;”;
- (e) the insertion after the definition of “semi-automatic” of the following definition:
 “**‘speculative search’** means that the bodyprints, fingerprints, intimate samples or non-intimate samples or the information derived from such samples taken, under any power conferred by this Act, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against—
 (i) in the case of bodyprints or fingerprints, the databases of the South African Police Service, the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the prints stored on these respective databases were collected before or after the coming into operation of this Act; or
 (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, the NDDSA.”

Amendment of section 113 of Act 60 of 2000, as amended by section 35 of Act 28 of 2006

8. The following section is hereby substituted for section 113 of the Firearms Control Act, 2000:

“Bodyprints and bodily samples for investigation purposes”

- 113.** (1) [Any] Subject to subsection (3), any police official may without warrant take fingerprints, [palm-prints, footprints] bodyprints, non-intimate samples and [bodily] intimate samples of a person or a group of persons or may cause any such prints or samples to be taken, if—
- (a) there are reasonable grounds to suspect that that person or that one or more of the persons in that group has committed an offence punishable with imprisonment for a period of five years or longer in terms of this Act; and
- (b) there are reasonable grounds to believe that the prints or samples or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of the persons as a possible perpetrator of the offence.
- (2) The person who has control over prints or samples taken in terms of this section—
- (a) may examine them for purposes of the investigation of the relevant offence or cause them to be so examined; and
- (b) [must immediately destroy them when it is clear that they will not be of value as evidence] may cause any prints, non-intimate samples, intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search.
- (3) [Bodily] Intimate samples to be taken from the body of a person, may

only be taken by a registered medical practitioner or a registered nurse.

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(4) A police official may do such tests, or cause such tests to be done, as may be necessary to determine whether a person suspected of having handled or discharged a firearm has indeed handled or discharged a firearm.

(5) (a) The fingerprints, bodyprints, intimate samples or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. 5

(b) Any person who uses or who allows the use of the fingerprints, bodyprints, intimate samples, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the circumstances set out in that paragraph, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years. 10 15

(c) The finger-prints and body-prints referred to in paragraph (a), must be stored by the Division: Criminal Record and Forensic Science Service of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act, 1995 (Act No. 68 of 1995). 20

(d) The intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act, 1995 (Act No. 68 of 1995). 25

(6) Despite subsection (5)(a), the fingerprints, bodyprints, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.” 30

Amendment of section 1 of Act 15 of 2003

9. Section 1 of the Explosives Act, 2003, is hereby amended by— 30

(a) the insertion after the definition of “authorised explosive” of the following definitions:

“**‘authorised person’** means in reference to—

(a) finger-prints, any police official in the performance of his or her official duties; or 35

(b) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate;

‘body-prints’ means prints taken from a person’s ear, foot, nose, palm or toes.”; 40

(b) the insertion after the definition of “detonate” of the following definitions:

“**‘DNA’** means deoxyribonucleic acid;

‘DNA analysis’ means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance.”; 45

(c) the insertion after the definition of “inspector” of the following definition:

“**‘intimate sample’** means a sample of blood other than a blood finger prick.”; 50

(d) the insertion after the definition of “Minister” of the following definitions:

“**‘NDDSA’** means the National DNA Database of South Africa, established in terms of section 15F of the South African Police Service Act, 1995 (Act No. 68 of 1995);

‘non-intimate sample’ means—

(a) a sample of hair other than pubic hair;

(b) a sample taken from a nail or from under a nail; 55

(c) a swab taken from the mouth (buccal swab);

(d) a blood finger prick; or

(e) a combination of these.”; and

(e) the insertion after the definition of “regulation” of the following definition:

“**‘speculative search’** means that the body-prints, fingerprints, intimate 60

samples or non-intimate samples or the information derived from such

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- samples taken, under any power conferred by this Act, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against—
- (i) in the case of body-prints or fingerprints, the databases of the South African Police Service, the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the prints stored on these respective databases were collected before or after the coming into operation of this Act; or
 - (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, the NDDSA.”.

Amendment of section 9 of Act 15 of 2003

10. The following section is hereby substituted for section 9 of the Explosives Act, 2003:

“Prints and samples for investigation purposes

9. (1) [Any] Subject to subsection (3), any police official may without warrant take fingerprints, **[palmprints, footprints]** ~~body-prints, non-intimate samples~~ and **[bodily]** ~~intimate~~ samples of a person or a group of persons or may cause any such prints or samples to be taken, if there are reasonable grounds to—
- (a) suspect that the person or that one or more of the persons in that group has committed an offence punishable with imprisonment for a period of five years or longer in terms of this Act; and
 - (b) believe that the prints or samples or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of the persons as possible perpetrators of the offence.
- (2) The person who has control over prints or samples taken in terms of this section—
- (a) may examine them for the purposes of the investigation of the relevant offence or cause them to be so examined; and
 - (b) **[must immediately destroy them when it is clear that they will not be of value as evidence]** ~~may cause any prints, non-intimate samples, intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search.~~
- (3) **[Bodily]** ~~Intimate~~ samples to be taken from the body of a person may only be taken by a registered medical practitioner or a registered nurse.
- (4) A police official may do such tests, or cause such tests to be done, as may be necessary to determine whether a person suspected of having handled or detonated an explosive has indeed handled or detonated an explosive.
- (5) (a) The fingerprints, body-prints, intimate samples or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.
- (b) Any person who uses or who allows the use of the fingerprints, body-prints, intimate samples, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the circumstances set out in that paragraph, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.
- (c) The fingerprints and body-prints referred to in paragraph (a), must be stored by the Division: Criminal Record and Forensic Science Service of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act, 1995 (Act No. 68 of 1995).
- (d) The intimate samples or non-intimate samples or the information

derived from such samples, as referred to in paragraph (a), which shall

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include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act, 1995 (Act No. 68 of 1995).

(6) Despite subsection (5)(a), the fingerprints, body-prints, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.”

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Short title and commencement

11. This Act is called the Criminal Law (Forensic Procedures) Amendment Act, 2009, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

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MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2009

1. BACKGROUND AND PURPOSE

- 1.1 The Office for Criminal Justice System Reform (OCJSR), which is responsible for the Review of the Criminal Justice System, has identified as a priority the need to strengthen the forensic investigative powers and capacity of the South African Police Service (SAPS). Through an analysis of existing legislation and regulations in South Africa, together with a comparative overview of recent crime scene and forensic developments in other jurisdictions, certain major legislative constraints and lacunas have been identified, in respect of at least two pivotal aspects of our forensic crime fighting capacity, namely the collection, storage and use of fingerprinting and DNA evidence.
- 1.2 Despite the fact that a number of Government Departments administer databases containing fingerprints, the SAPS currently, due to legal and information technology reasons, only have access to the fingerprints stored on the SAPS AFIS system. As a result, the SAPS have no access to the HANIS system of the Department of Home Affairs, where fingerprints of 31 million citizens and about 2.5 million foreigners are kept, or to the E-NATIS system of the Department of Transport, where a further 6 million thumbprints are located. In this regard it must be noted that the Review, through an analysis of a compendium of statistics, found that in a large proportion of cases the perpetrator remained undetected. In addition, the current legislative scheme as set out in section 37 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA), does not make the taking of fingerprints compulsory, even in instances where a person has been convicted of an offence. Section 37(5) of the CPA, further requires the destruction of fingerprints, palm-prints, foot-prints, photographs and the record of steps taken to obtain such evidence if a person is found not guilty or if no prosecution was instituted against a person from whom such evidence was collected. Therefore, the manner in which fingerprints are currently collected, loaded onto the SAPS's fingerprint database and used, means that a fingerprint lifted at a crime scene will most likely only be checked against the "limited" number of fingerprints from convicted offenders, which have been included in the database.
- 1.3 Although the taking of blood samples in criminal cases and the ascertainment of other bodily features are broadly regulated by section 37 of the CPA, no mention is made of the collection of DNA evidence. There is no legislation in South Africa which specifically provides for the establishment and administration of a DNA database as a criminal intelligence tool. The advantages of a strengthened forensic crime fighting capacity in these two areas can be summarised as follows:
 - 1.3.1 A DNA database and an expanded fingerprint capacity are important intelligence tools, particularly in crimes where detection is generally low, such as property crimes and can lead to a significant increase in suspect-to-crime-scene matches.
 - 1.3.2 DNA scene-to-scene matches help identify patterns of criminal behaviour that may solve past, existing and future crimes. In other words, not only will an expanded fingerprint database and DNA database increase the likelihood of identifying unknown perpetrators, but it will also increase the possibility of linking perpetrators to multiple crime scenes.
 - 1.3.3 Plea bargains increase when suspects are confronted with real evidence, such as fingerprints and DNA evidence linking them to a

crime scene.

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- 1.3.4 It should also always be borne in mind that fingerprints and especially DNA evidence are used not only to prove guilt, but also to prove innocence.

- 1.4 In response to the above mentioned legislative shortcomings, the Criminal Law (Forensic Procedures) Amendment Bill (the Bill) has been drafted to provide the SAPS with access to fingerprint databases of other Government Departments for criminal investigation purposes, the expansion of the SAPS's powers to take and retain fingerprints and other biometric materials and to provide for the establishment, administration and use of a DNA database. The Bill aims to achieve these objectives whilst providing for strict safeguards and penalties to ensure that forensic materials are collected, stored and used only for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

2. PROVISIONS OF THE BILL

- 2.1 **Clause 1** seeks to amend the heading of Chapter 3 of the CPA, in order to ensure that the provisions of Chapter 3 are not limited in its application to accused persons only.
- 2.2 **Clause 2** seeks to—
- 2.2.1 insert a definition clause into Chapter 3 of the CPA, in order to, amongst others, clarify the new terminology associated with the establishment of a DNA database.
- 2.2.2 insert a new clause into Chapter 3 of the CPA to provide the police with powers in respect of the taking of fingerprints and non-intimate samples of accused and convicted persons. This clause makes the taking of fingerprints and non-intimate samples from certain categories of accused and convicted persons compulsory and it provides for the retention of such prints and samples, but stipulates that it may only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. The clause further provides that the fingerprints, non-intimate samples or the information derived from such samples (DNA profiles), may be subjected to a speculative search against other databases, in the case of fingerprints, or against the National DNA Database of South Africa (NDDSA) in the case of non-intimate samples or the information derived from such samples. Clause 3 applies retrospectively to any convicted person serving a sentence at the time of the commencement of the Act.
- 2.2.3 insert a new clause into Chapter 3 of the CPA to provide the police with powers to take fingerprints, body-prints and non-intimate samples for investigative purposes.
- 2.3 **Clause 3** seeks to amend section 37 of the CPA by making certain consequential amendments as a result of the insertion of a new section 36B. Section 37 is further amended to ensure that prints and samples taken under this section are no longer destroyed, but are retained to be used only for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. Provision is also made for prints and samples taken under any power conferred by section 37 to be subjected to a speculative search.
- 2.4 **Clause 4** seeks to affect certain consequential amendments to section 212 of the CPA, which deals with proof of certain facts by affidavit or certificate.
- 2.5 **Clause 5** seeks to affect certain consequential amendments to section 225 of the CPA, which deals with evidence obtained not in accordance with Chapter

3 of the CPA or against the will of the accused.

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- 2.6 **Clause 6** seeks to amend the South African Police Service Act, 1995 (Act No. 68 of 1995) (SAPS Act), by inserting a new Chapter 5A, in order to deal with the storage and use of finger-prints, body-prints and photographic images of persons.
- 2.6.1 Further amend the SAPS Act, by inserting a new Chapter 5B, in order to deal with the establishment, administration, maintenance and use of the National DNA Database of South Africa.
- 2.7 **Clause 7** seeks to affect certain consequential amendments to section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000), in order to bring the provisions dealing with the powers of the police to take prints and samples in line with the new provisions in the CPA.
- 2.8 **Clause 8** seeks to affect certain consequential amendments to section 113 of the Firearms Control Act, 2000 (Act No. 60 of 2000), which deals with the taking of body-prints and bodily samples for investigation purposes.
- 2.9 **Clause 9** seeks to affect certain consequential amendments to section 1 of the Explosives Act, 2003 (Act No. 15 of 2003), in order to bring the provisions dealing with the powers of the police to take prints and samples in line with the new provisions in the CPA.
- 2.10 **Clause 10** seeks to affect certain consequential amendments to section 9 of the Explosives Act, 2003 (Act No. 15 of 2003), which deals with the taking of prints and samples for investigative purposes.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Bill was developed in consultation with the South African Police Service, the National Prosecuting Authority, the Department of Correctional Services, the Department of Home Affairs, the Department of Transport, National Treasury and the DNA Project.

4. IMPLICATIONS FOR PROVINCES

None.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The implementation of the Bill will require significant capacity expansion in respect of both human and other resources, which will require funding to undertake the development of a business systems reengineering plan (including current and to be process mapping). Additional personnel will have to be trained and retention strategies, such as an occupation specific dispensation, must be implemented to retain scarce skills within the forensic science field. A business plan has been developed to map the incremental implementation of the Bill.

6. FINANCIAL IMPLICATIONS FOR STATE

The Bill has been costed and a business plan has been developed to map the incremental implementation of the Bill. National Treasury has been consulted in order to secure a budget for the implementation of the Bill.

7. COMMUNICATION IMPLICATIONS

The implementation of the Bill must be accompanied by a communication strategy and training for all role players, including the public at large, in order to create an awareness amongst everyone as to the importance of finger-print and DNA evidence and the need not to contaminate crime scenes.

8. PARLIAMENTARY PROCEDURE

- 8.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 8.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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CRIMINAL PROCEDURE ACT

NO. 51 OF 1977

[View Regulation]

[ASSENTED TO 21 APRIL, 1977]
[DATE OF COMMENCEMENT: 22 JULY, 1977]

(Afrikaans text signed by the State President)

as amended by

Criminal Procedure Matters Amendment Act, No. 79 of 1978

Criminal Procedure Amendment Act, No. 56 of 1979

Criminal Procedure Amendment Act, No. 64 of 1982

Appeals Amendment Act, No. 105 of 1982
[with effect from 1 April, 1983]

Criminal Law Amendment Act, No. 59 of 1983

Criminal Procedure Matters Amendment Act, No. 109 of 1984

Immorality and Prohibition of Mixed Marriages Amendment Act, No. 72 of 1985

Criminal Procedure Amendment Act, No. 33 of 1986

Special Courts for Blacks Abolition Act, No. 34 of 1986
[with effect from 1 August, 1986]

Transfer of Powers and Duties of the State President Act, No. 97 of 1986
[with effect from 3 October, 1986]

Criminal Procedure Amendment Act, No. 26 of 1987

Law of Evidence and the Criminal Procedure Amendment Act, No. 103 of 1987

Law of Evidence Act, No. 45 of 1988
[with effect from 3 October, 1988]

Criminal Procedure Amendment Act, No. 8 of 1989

Criminal Law and the Criminal Procedure Amendment Act, No. 39 of 1989

Judicial Matters Amendment Act, No. 77 of 1989
[with effect from 31 July, 1989]

Criminal Law Amendment Act, No. 107 of 1990

Criminal Procedure Amendment Act, No. 5 of 1991

Transfer of Powers and Duties of the State President Act, No. 51 of 1991
[with effect from 29 April, 1991]

Correctional Services and Supervision Matters Amendment Act, No. 122 of 1991

[with effect from 15 August, 1991]

Criminal Law Amendment Act, No. 135 of 1991

Criminal Law Amendment Act, No. 4 of 1992

Prevention and Treatment of Drug Dependency Act, No. 20 of 1992

[with effect from 30 April, 1993]

Attorney-General Act, Act No. 92 of 1992

[with effect from 31 December, 1992]

Criminal Law Second Amendment Act, No. 126 of 1992

General Law Amendment Act, No. 139 of 1992

[with effect from 7 August, 1992]

Criminal Matters Amendment Act, No. 116 of 1993

General Law Third Amendment Act, No. 129 of 1993

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General Law Fifth Amendment Act, No. 157 of 1993

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General Law Sixth Amendment Act, No. 204 of 1993

[with effect from 1 March, 1994]

Criminal Procedure Second Amendment Act, No. 75 of 1995

Justice Laws Rationalisation Act, No. 18 of 1996

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General Law Amendment Act, No. 49 of 1996

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International Co-operation in Criminal Matters Act, No. 75 of 1996

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Abolition of Restrictions on the Jurisdiction of Courts Act, No. 88 of 1996

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National Prosecuting Authority Act, No. 32 of 1998

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[with effect from 1 August, 1998 and 15 January, 1999]

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Witness Protection Act, No. 112 of 1998
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Domestic Violence Act, No. 116 of 1998

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Criminal Procedure Amendment Act, No. 17 of 2001

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ACT

To make provision for procedures and related matters in criminal proceedings.

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DEFINITIONS

1. Definitions.—(1) In this Act, unless the context otherwise indicates—

“aggravating circumstances”, in relation to—

(a)

[Para. (a) deleted by s. 1 of Act No. 107 of 1990.]

Wording of Sections

(b) robbery or attempted robbery, means—

- (i) the wielding of a fire-arm or any other dangerous weapon;
- (ii) the infliction of grievous bodily harm; or
- (iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;

“bank” means a bank defined in section 1 of the Banks Act, 1990 (Act 94 of 1990), and includes the Land and Agricultural Bank of South Africa referred to in section 3 of the Land Bank Act, 1944 (Act 13 of 1944), and a mutual building society as defined in Act section 1 of the Mutual Building Societies Act, 1965 (Act 24 of 1965);

[Definition of “bank” substituted by s. 1 (a) of Act No. 5 of 1991 and by s. 38 of Act No. 129 of 1993.]

Wording of Sections

“**charge**” includes an indictment and a summons;

“**Commissioner**” means the Commissioner of Correctional Services as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), or a person authorized by him;

[Definition of “Commissioner” inserted by s. 35 of Act No. 122 of 1991.]

“**correctional official**” means a correctional official as defined in section 1 of the Correctional Services Act, 1959;

[Definition of “correctional official” inserted by s. 35 of Act No. 122 of 1991.]

“**correctional supervision**” means a community-based punishment to which a person is subject in accordance with Chapter VIIIA of the Correctional Services Act, 1959, and the regulations made under that Act if—

- (a) he has been placed under that under section 6 (1) (c);
- (b) it has been imposed on him under section 276 (1) (h) or (i) and he, in the latter case, has been placed under that;
- (c) his sentence has been converted into that under section 276A (3) (e) (ii), 286B (4) (b) (ii) or 287 (4) (b) or he has been placed under that under section 286B (5) (iii) or 287 (4) (a);

[Para. (c) substituted by s. 16 of Act No. 116 of 1993.]

Wording of Sections

- (d) it is a condition on which the passing of his sentence has been postponed and he has been released under section 297 (1) (a) (i) (ccA); or
- (e) it is a condition on which the operation of—
 - (i) the whole or any part; or
 - (ii) any part,of his sentence has been suspended under section 297 (1) (b) or (4), respectively;

[Definition of “correctional supervision” inserted by s. 35 of Act No. 122 of 1991.]

“**criminal proceedings**” includes a preparatory examination under Chapter 20;

“**day**” means the space of time between sunrise and sunset;

“**justice**” means a person who is a justice of the peace under the provisions of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963);

“**law**”

[Definition of “law” deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

“**local division**” means a local division of the Supreme Court established under the Supreme Court Act, 1959 (Act 59 of 1959);

“**lower court**” means any court established under the provisions of the Magistrates’ Courts Act, 1944 (Act 32 of 1944);

“magistrate” includes an additional magistrate and an assistant magistrate but not a regional magistrate;

“magistrate’s court” means a court established for any district under the provisions of the Magistrates’ Courts Act, 1944 (Act 32 of 1944), and includes any other court established under such provisions, other than a court for a regional division;

“Minister” means the Minister of Justice;

“night” means the space of time between sunset and sunrise;

“offence” means an act or omission punishable by law;

“peace officer” includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section;

[Definition of “peace officer” amended by s. 4 of Act No. 18 of 1996.]

Wording of Sections

“police official” means any member of the Force as defined in Act section 1 of the Police Act, 1958 (Act 7 of 1958), and **“police”** has a corresponding meaning;

[Definition of “police official” substituted by s. 1 (b) of Act No. 5 of 1991.]

Wording of Sections

“premises” includes land, any building or structure, or any vehicle, conveyance, ship, boat or aircraft;

“province”

[Definition of “province” deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

“provincial administration”

[Definition of “provincial administration” deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

“provincial division” means a provincial division of the Supreme Court established under the Supreme Court Act, 1959 (Act 59 of 1959);

“regional court” means a court established for a regional division under the provisions of the Magistrates’ Courts Act, 1944 (Act 32 of 1944);

“regional magistrate” means a magistrate appointed under the provisions of the Magistrates’ Courts Act, 1944 (Act 32 of 1944), to the court for a regional division;

“Republic”

[Definition of “Republic” deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

“rules of court” means the rules made under section 43 of the Supreme Court Act, 1959 (Act 59 of 1959), or under section 6 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985);

[Definition of “rules of court” substituted by s. 1 (c) of Act No. 5 of 1991.]

Wording of Sections

“special superior court”

[Definition of “special superior court” deleted by s. 7 of Act No. 62 of 2000.]

Wording of Sections

“State”

[Definition of “State” deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

“superior court” means a provincial or local division of the Supreme Court established under the Supreme Court Act, 1959 (Act 59 of 1959);

“supreme court” means the Supreme Court of South Africa established under the Supreme Court Act, 1959 (Act 59 of 1959);

“territory”

[Definition of “territory” deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

“this Act” includes the rules of court and any regulations made under this Act.

(2) Any reference in any law to an inferior court shall, unless the context of such law indicates otherwise, be construed as a reference to a lower court as defined in subsection (1).

CHAPTER 1 PROSECUTING AUTHORITY

2.

[S. 2 repealed by s. 44 of Act No. 32 of 1998.]

Wording of Sections

3.

[S. 3 amended by s. 11 of Act No. 59 of 1983 and repealed by Act s. 8 of Act Act No. 92 of 1992.]

Wording of Sections

4.

[S. 4 repealed by Act s. 8 of Act Act No. 92 of 1992.]

Wording of Sections

5.

[S. 5 repealed by s. 44 of Act No. 32 of 1998.]

Wording of Sections

6. Power to withdraw charge or stop prosecution.—An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may—

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in

respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.

7. Private prosecution on certificate *nolle prosequi*.—(1) In any case in which an attorney-general declines to prosecute for an alleged offence—

- (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
- (b) a husband, if the said offence was committed in respect of his wife;
- (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
- (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward,

may, subject to the provisions of section 9, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State

(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).

(c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within three months of the date of the certificate.

(d) The provisions of paragraph (c) shall apply also with reference to a certificate granted before the commencement of this Act under the provisions of any law repealed by this Act, and the date of such certificate shall, for the purposes of this paragraph, be deemed to be the date of commencement of this Act.

8. Private prosecution under statutory right.—(1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney-general concerned and after the attorney-general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.

(3) An attorney-general may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general, and that the attorney-general may at any time exercise with reference to any such

prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.

9. Security by private prosecutor.—(1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he deposits with the magistrate's court in whose area of jurisdiction the offence was committed—

- (a) the amount the Minister may from time to time determine by notice in the *Gazette* as security that he will prosecute the charge against the accused to a conclusion without undue delay; and

[Para. (a) substituted by s. 39 of Act No. 129 of 1993.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

- (b) the amount such court may determine as security for the costs which may be incurred in respect of the accused's defence to the charge.

[Para. (b) substituted by s. 39 of Act No. 129 of 1993.]

Wording of Sections

(2) The accused may, when he is called upon to plead to the charge, apply to the court hearing the charge to review the amount determined under subsection (1) (b), whereupon the court may, before the accused pleads—

- (a) require the private prosecutor to deposit such additional amount as the court may determine with the magistrate's court in which the said amount was deposited; or
- (b) direct that the private prosecutor enter into a recognizance, with or without sureties, in such additional amount as the court may determine.

(3) Where a private prosecutor fails to prosecute a charge against an accused to a conclusion without undue delay or where a charge is dismissed under section 11, the amount referred to in subsection (1) (a) shall be forfeited to the State.

10. Private prosecution in name of private prosecutor.—(1) A private prosecution shall be instituted and conducted and all process in connection therewith issued in the name of the private prosecutor.

(2) The indictment, charge-sheet or summons, as the case may be, shall describe the private prosecutor with certainty and precision and shall, except in the case of a body referred to in section 8, be signed by such prosecutor or his legal representative.

(3) Two or more persons shall not prosecute in the same charge except where two or more persons have been injured by the same offence.

11. Failure of private prosecutor to appear.—(1) If the private prosecutor does not appear on the day set down for the appearance of the accused in the magistrate's court or for the trial of the accused, the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control, in which event the court may adjourn the case to a later date.

(2) Where the charge is so dismissed, the accused shall forthwith be discharged from custody and may not in respect of that charge be prosecuted privately again but the attorney-general or a public prosecutor with the consent of the attorney-general may at the instance of the State prosecute the accused in respect of that charge.

12. Mode of conducting private prosecution.—(1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State: Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.

(2) Where the prosecution is instituted under section 7 (1) and the accused pleads guilty to the charge, the prosecution shall be continued at the instance of the State.

13. Attorney-general may intervene in private prosecution.—An attorney-general or a local public prosecutor acting on the instructions of the attorney-general, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

14. Costs in respect of process.—A private prosecutor, other than a prosecutor contemplated in section 8, shall in respect of any process relating to the private prosecution, pay to the clerk or, as the case may be, the registrar of the court in question, the fees prescribed under the rules of court for the service or execution of such process.

15. Costs of private prosecution.—(1) The costs and expenses of a private prosecutor shall, subject to the provisions of subsection (2), be paid by the private prosecutor.

(2) The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8: Provided further that where a private prosecution is instituted after the grant of a certificate by an attorney-general that he declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State.

[Sub-s. (2) amended by s. 1 of Act No. 26 of 1987.]

Wording of Sections

16. Costs of accused in private prosecution.—(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal.

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred in connection with the prosecution, as it may deem fit.

[S. 16 substituted by s. 40 of Act No. 129 of 1993.]

Wording of Sections

17. Taxation of costs.—(1) The provisions of section 300 (3) shall apply with reference to any order or award made under section 15 or 16 in connection with costs and expenses.

(2) Costs awarded under section 15 or 16 shall be taxed according to the scale, in civil cases, of the court which makes the award or, if the award is made by a regional court, according to the

scale, in civil cases, of a magistrate's court, or, where there is more than one such scale, according to the scale determined by the court making the award.

18. Prescription of right to institute prosecution.—The right to institute a prosecution for any offence, other than the offences of—

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing;
- (f) rape; or
- (g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002,

[Para. (g) added by s. 39 of Act No. 27 of 2002.]

shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

[S. 18 substituted by s. 27 of Act No. 105 of 1997.]

Wording of Sections

CHAPTER 2

SEARCH WARRANTS, ENTERING OF PREMISES, SEIZURE, FORFEITURE AND DISPOSAL OF PROPERTY CONNECTED WITH OFFENCES

19. Saving as to certain powers conferred by other laws.—The provisions of this Chapter shall not derogate from any power conferred by any other law to enter any premises or to search any person, container or premises or to seize any matter, to declare any matter forfeited or to dispose of any matter.

20. State may seize certain articles.—The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
- (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

21. Article to be seized under search warrant.—(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—

- (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises

within his area of jurisdiction; or

- (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence of such proceedings.

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

(3) (a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.

22. Circumstances in which article may be seized without search warrant.—A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes—
 - (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search.

23. Search of arrested person and seizure of article.—(1) On the arrest of any person, the person making the arrest may—

- (a) if he is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he shall forthwith deliver any such article to a police official; or
- (b) if he is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.

(2) On the arrest of any person, the person making the arrest may place in safe custody any object found on the person arrested and which may be used to cause bodily harm to himself or others.

[Sub-s. (2) added by s. 1 of Act No. 33 of 1986.]

24. Search of premises.—Any person who is lawfully in charge or occupation of any premises and who reasonably suspects that stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises concerned, or that any article has been placed thereon or therein or is in the custody or possession of any person upon or in such premises in contravention of any law relating to intoxicating liquor, dependence-producing drugs, arms and ammunition or

explosives, may at any time, if a police official is not readily available, enter such premises for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found, he shall take possession thereof and forthwith deliver it to a police official.

[S. 24 substituted by s. 12 of Act No. 59 of 1983.]

Wording of Sections

25. Power of police to enter premises in connection with State security or any offence.—(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing—

- (a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or
- (b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,

he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose—

- (i) of carrying out such investigations and of taking such steps as such police official may consider necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence;
- (ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and
- (iii) of seizing any such article.

(2) A warrant under subsection (1) may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he on reasonable grounds believes—

- (a) that a warrant will be issued to him under paragraph (a) or (b) of subsection (1) if he applies for such warrant; and
- (b) that the delay in obtaining such warrant would defeat the object thereof.

26. Entering of premises for purposes of obtaining evidence.—Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.

27. Resistance against entry or search.—(1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such police official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises.

(2) The proviso to subsection (1) shall not apply where the police official concerned is on

reasonable grounds of the opinion that any article which is the subject of the search may be destroyed or disposed of if the provisions of the said proviso are first complied with.

28. Wrongful search an offence, and award of damages.—(1) A police official—

- (a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25 (1); or
- (b) who, without being authorized thereto under this Chapter—
 - (i) searches any person or container or premises or seizes or detains any article; or
 - (ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25 (1),

shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award under subsection (2).

[Sub-s. (1) amended by s. 2 of Act No. 33 of 1986.]

Wording of Sections

(2) Where any person falsely gives information on oath under section 21 (1) or 25 (1) and a search warrant or, as the case may be, a warrant is issued and executed on such information, and such person is in consequence of such false information convicted of perjury, the court convicting such person may, upon the application of any person who has suffered damage in consequence of the unlawful entry, search or seizure, as the case may be, or upon the application of the prosecutor acting on the instructions of that person, award compensation in respect of such damage, whereupon the provisions of section 300 shall *mutatis mutandis* apply with reference to such award.

29. Search to be conducted in decent and orderly manner.—A search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.

30. Disposal by police official of article after seizure.—A police official who seizes any article referred to in section 20 or to whom any such article is under the provisions of this Chapter delivered—

- (a) may, if the article is perishable, with due regard to the interests of the persons concerned, dispose of the article in such manner as the circumstances may require; or
- (b) may, if the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such police official, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so; or
- (c) shall, if the article is not disposed of or delivered under the provisions of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.

31. Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings.—(1) (a) If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person

may not lawfully possess such article, to the person who may lawfully possess it.

(b) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

[Para. (b) substituted by s. 2 of Act No. 5 of 1991.]

Wording of Sections

(2) The person who may lawfully possess the article in question shall be notified by registered post at his last-known address that he may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.

32. Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid.—(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his guilt in accordance with the provisions of section 57, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person.

(2) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

[Sub-s. (2) substituted by s. 3 of Act No. 5 of 1991.]

Wording of Sections

33. Article to be transferred to court for purposes of trial.—(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and such article is required at the trial for the purposes of evidence or for the purposes of an order of court, the police official charged with the investigation shall, subject to the provisions of subsection (2) of this section, deliver such article to the clerk of the court where such criminal proceedings are instituted.

[Sub-s. (1) substituted by s. 4 of Act No. 5 of 1991.]

Wording of Sections

(2) If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the clerk of the court in terms of subsection (1), the clerk of the court may require the police official in charge of the investigation to retain the article in police custody or in such other custody as may be determined in terms of section 30 (c).

[Sub-s. (2) substituted by s. 4 of Act No. 5 of 1991.]

Wording of Sections

(3) (a) The clerk of the court shall place any article received under subsection (1) in safe custody, which may include the deposit of money in an official banking account if such money is not required at the trial for the purposes of evidence.

(b) Where the trial in question is to be conducted in a court other than a court of which such clerk is the clerk of the court, such clerk of the court shall—

- (i) transfer any article received under subsection (1), other than money deposited in a banking account under paragraph (a) of this subsection, to the clerk of the court or, as the case may be, the registrar of the court in which the trial is to be conducted, and such clerk or registrar of the court shall place such article in safe custody;
- (ii) in the case of any article retained in police custody or in some other custody in accordance with the provisions of subsection (2) or in the case of any money deposited

in a banking account under paragraph (a) of this subsection, advise the clerk or registrar of such other court of the fact of such custody or such deposit, as the case may be.

34. Disposal of article after commencement of criminal proceedings.—(1) The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law under which any matter shall or may be forfeited, make an order that any article referred to in section 33—

- (a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or
- (b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
- (c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.

(2) The court may, for the purpose of any order under subsection (1), hear such additional evidence, whether by affidavit or orally, as it may deem fit.

(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he may deem fit.

(4) Any order made under subsection (1) or (3) may be suspended pending any appeal or review.

(5) Where the court makes any order under paragraph (a) or (b) of subsection (1), the provisions of section 31 (2) shall *mutatis mutandis* apply with reference to the person in favour of whom such order is made.

(6) If the circumstances so require or if the criminal proceedings in question cannot for any reason be disposed of, the judge or judicial officer concerned may make any order referred to in paragraph (a), (b) or (c) of subsection (1) at any stage of the proceedings.

35. Forfeiture of article to State.—(1) A court which convicts an accused of any offence may, without notice to any person, declare—

- (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
- (b) if the conviction is in respect of an offence referred to in Part I of Schedule 1, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property,

and which was seized under the provisions of this Act, forfeited to the State: Provided that such forfeiture shall not affect any right referred to in subparagraph (i) or (ii) of subsection (4) (a) if it is proved that person who claims such right did not know that such weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.

(2) A court which convicts an accused or which finds an accused not guilty of any offence, shall declare forfeited to the State any article seized under the provisions of this Act which is forged or counterfeit or which cannot lawfully be possessed by any person.

(3) Any weapon, instrument, vehicle, container or other article declared forfeited under the provisions of subsection (1), shall be kept for a period of thirty days with effect from the date of declaration of forfeiture or, if an application is within that period received from any person for the determination of any right referred to in subparagraph (i) or (ii) of subsection (4) (a), until a final decision in respect of any such application has been given.

(4) (a) The court in question or, if the judge or judicial officer concerned is not available, any judge or judicial officer of the court in question, may at any time within a period of three years with effect from the date of declaration of forfeiture, upon the application of any person, other than the accused, who claims that any right referred to in subparagraph (i) or (ii) of this paragraph is vested in him, inquire into and determine any such right, and if the court finds that the weapon, instrument, vehicle, container or other article in question—

- (i) is the property of any such person, the court shall set aside the declaration of forfeiture and direct that the weapon, instrument, vehicle, container or other article, as the case may be, be returned to such person, or, if the State has disposed of the weapon, instrument, vehicle, container or other article in question, direct that such person be compensated by the State to the extent to which the State has been enriched by such disposal;
- (ii) was sold to the accused in pursuance of a contract under which he becomes the owner of such weapon, instrument, vehicle, container or other article, as the case may be, upon the payment of a stipulated price, whether by instalments or otherwise, and under which the seller becomes entitled to the return of such weapon, instrument, vehicle, container or other article upon default of payment of the stipulated price or any part thereof—
 - (aa) the court shall direct that the weapon, instrument, vehicle, container or other article in question be sold by public auction and that the said seller be paid out of the proceeds of the sale an amount equal to the value of his rights under the contract to the weapon, instrument, vehicle, container or other article, but not exceeding the proceeds of the sale; or
 - (bb) if the State has disposed of the weapon, instrument, vehicle, container or other article in question, the court shall direct that the said seller be likewise compensated.

(b) If a determination by the court under paragraph (a) is adverse to the applicant, he may appeal therefrom as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction.

(c) When determining any rights under this subsection, the record of the criminal proceedings in which the declaration of forfeiture was made, shall form part of the relevant proceedings, and the court making the determination may hear such additional evidence, whether by affidavit or orally, as it may deem fit.

36. Disposal of article concerned in an offence committed outside Republic.—(1) Where an article is seized in connection with which—

- (a) an offence was committed or is on reasonable grounds suspected to have been committed in a country outside the Republic;

- (b) there are reasonable grounds for believing that it will afford evidence as to the commission in a country outside the Republic of any offence or that it was used for the purpose of or in connection with such commission of any offence,

the magistrate within whose area of jurisdiction the article was seized may, on application and if satisfied that such offence is punishable in such country by death or by imprisonment for a period of twelve months or more or by a fine of five hundred rand or more, order such article to be delivered to a member of a police force established in such country who may thereupon remove it from the Republic.

(2) Whenever the article so removed from the Republic is returned to the magistrate, or whenever the magistrate refuses to order that the article be delivered as aforesaid, the article shall be returned to the person from whose possession it was taken, unless the magistrate is authorized or required by law to dispose of it otherwise.

CHAPTER 3 ASCERTAINMENT OF BODILY FEATURES OF ACCUSED

37. Powers in respect of prints and bodily appearance of accused.—(1) Any police official may—

- (a) take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken—
 - (i) of any person arrested upon any charge;
 - (ii) of any such person released on bail or on warning under section 72;
 - (iii) of any person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of section 40 (1);
 - (iv) of any person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or
 - (v) of any person convicted by a court or deemed under section 57 (6) to have been convicted in respect of any offence which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph;
- (b) make a person referred to in paragraph (a) (i) or (ii) available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine;
- (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female;
- (d) take a photograph or may cause a photograph to be taken of a person referred to in paragraph (a) (i) or (ii).

[Para. (d) added by s. 1 (a) of Act No. 64 of 1982.]

(2) (a) Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps,

including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.

(b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken.

(3) Any court before which criminal proceedings are pending may—

- (a) in any case in which a police official is not empowered under subsection (1) to take finger-prints, palm-prints or foot-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;
- (b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.

(4) Any court which has convicted any person of any offence or which has concluded a preparatory examination against any person on any charge, or any magistrate, may order that the finger-prints, palm-prints or foot-prints, or a photograph, of the person concerned be taken.

[Sub-s. (4) substituted by s. 1 (b) of Act No. 64 of 1982.]

Wording of Sections

(5) Finger-prints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.

[Sub-s. (5) substituted by s. 1 (c) of Act No. 64 of 1982.]

Wording of Sections

CHAPTER 4

METHODS OF SECURING ATTENDANCE OF ACCUSED IN COURT

38. Methods of securing attendance of accused in court.—The methods of securing the attendance of an accused in court for the purposes of his trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.

CHAPTER 5

ARREST

39. Manner and effect of arrest.—(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after

effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.

40. Arrest by peace officer without warrant.—(1) A peace officer may without warrant arrest any person—

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
- (c) who has escaped or who attempts to escape from lawful custody;
- (d) who has in his possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

[Para. (d) substituted by s. 41 of Act No. 129 of 1993.]

Wording of Sections

- (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;
- (f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;
- (g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;
- (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;
- (i) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;
- (j) who wilfully obstructs him in the execution of his duty;
- (k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;
- (l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;
- (m) who is reasonably suspected of being a deserter from the South African National Defence Force;

(Para. (m) amended by s. 4 of Act No. 18 of 1996.)

Wording of Sections

- (n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

- (o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;
- (p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;
- (q) who is reasonably suspected of having committed an act of domestic violence as contemplated in section (1) of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

[Para. (q) added by s. 20 of Act No. 116 of 1998.]

(2) If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.

41. Name and address of certain persons and power of arrest by peace officer without warrant.—(1) A peace officer may call upon any person—

- (a) whom he has power to arrest;
- (b) who is reasonably suspected of having committed or of having attempted to commit an offence;
- (c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address, and if such person fails to furnish his full name and address, the peace officer may forthwith and without warrant arrest him, or, if such person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest him without warrant and detain him for a period not exceeding twelve hours until such name or address has been verified.

(2) Any person who, when called upon under the provisions of subsection (1) to furnish his name and address, fails to do so or furnishes a false or incorrect name and address, shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Sub-s. (2) substituted by s. 3 of Act No. 33 of 1986.]

Wording of Sections

42. Arrest by private person without warrant.—(1) Any private person may without warrant arrest any person—

- (a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;
- (b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
- (c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;
- (d) whom he sees engaged in an affray.

(2) Any private person who may without warrant arrest any person under subsection (1) (a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.

[Sub-s. (3) substituted by s. 13 of Act No. 59 of 1983.]

Wording of Sections

43. Warrant of arrest may be issued by magistrate or justice.—(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police—

- (a) which sets out the offence alleged to have been committed;
- (b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
- (c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.

44. Execution of warrants.—A warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof.

45. Arrest on telegraphic authority.—(1) A telegraphic or similar written or printed communication from any magistrate, justice or peace officer stating that a warrant has been issued for the arrest of any person, shall be sufficient authority to any peace officer for the arrest and detention of that person.

(2) The provisions of section 50 shall apply with reference to an arrest effected in accordance with subsection (1).

46. Non-liability for wrongful arrest.—(1) Any person who is authorized to arrest another under a warrant of arrest or a communication under section 45 and who in the reasonable belief that he is arresting such person arrests another, shall be exempt from liability in respect of such wrongful arrest.

(2) Any person who is called upon to assist in making an arrest as contemplated in subsection (1) or who is required to detain a person so arrested, and who reasonably believes that the said person is the person whose arrest has been authorized by the warrant of arrest or the communication, shall likewise be exempt from liability in respect of such assistance or detention.

47. Private persons to assist in arrest when called upon.—(1) Every male inhabitant of the Republic of an age not below sixteen and not exceeding sixty years shall, when called upon by any

police official to do so, assist such police official—

- (a) in arresting any person;
- (b) in detaining any person so arrested.

(2) Any person who, without sufficient cause, fails to assist a police official as provided in subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Sub-s. (2) substituted by s. 4 of Act No. 33 of 1986.]

Wording of Sections

48. Breaking open premises for purpose of arrest.—Any person who may lawfully arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may, if he first audibly demands entry into such premises and notifies the purpose for which he seeks entry and fails to gain entry, break open, enter and search such premises for the purpose of effecting the arrest.

49. Use of force in effecting arrest.—(1) For the purposes of this section—

- (a) “**arrestor**” means any person authorised under this Act to arrest or to assist in arresting a suspect; and
- (b) “**suspect**” means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—

- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

[S. 49 substituted by s. 7 of Act No. 122 of 1998.]

Wording of Sections

50. Procedure after arrest.—(1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that—

- (i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A,
he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires—

- (i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;
- (ii) or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a lower court, the court before which he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court: Provided that the court may, on an application as aforesaid, authorise that the arrested person be further detained at a place specified by the court and for such period as the court may deem necessary; or

[Sub-para. (ii) substituted by s. 3 (a) of Act No. 34 of 1998.]

Wording of Sections

- (iii) at a time when the arrested person is outside the area of jurisdiction of the lower court to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court.

[Sub-s. (1) substituted by s. 1 (a) of Act No. 85 of 1997. Para. (d) added by s. 1 of Act No. 56 of 1979.]

Wording of Sections

(2) For purposes of this section—

- (a) “a court day” means a day on which the court in question normally sits as a court and “ordinary court day” has a corresponding meaning; and
- (b) “ordinary court hours” means the hours from 9:00 until 16:00 on a court day.

[Sub-s. (2) substituted by s. 1 (a) of Act No. 85 of 1997.]

Wording of Sections

(3) Subject to the provisions of subsection (6), nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court.

[Sub-s. (3) substituted by s. 1 (a) of Act No. 75 of 1995 and by s. 8 (1) (a) of Act No. 62 of 2000.]

Wording of Sections

(4) The parent or guardian of a person under the age of eighteen years shall, if it is known that such parent or guardian can readily be reached or can be traced without undue delay, be notified forthwith of the arrest of such person by the police official charged with the investigation of the case.

[Sub-s. (4) added by s. 37 of Act No. 122 of 1991.]

(5) The probation officer in whose area of jurisdiction the arrest of a person under the age of eighteen years has taken place, shall as soon as possible thereafter be notified thereof by the police official charged with the investigation of the case or, if there is no such probation officer or if he is not available and there is a correctional official who is doing duty in the area concerned and who is available, the latter shall as soon as possible thereafter be notified thereof.

[Sub-s. (5) added by s. 37 of Act No. 122 of 1991.]

(6) (a) At his or her first appearance in court a person contemplated in subsection (1) (a) who—

(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60—

(aa) be informed by the court of the reason for his or her further detention; or

[Sup-para. (aa) substituted by s. 3 (b) of Act No. 34 of 1998.]

Wording of Sections

(bb) be charged and be entitled to apply to be released on bail,

and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or

(ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.

(b) An arrested person contemplated in paragraph (a) (i) is not entitled to be brought to court outside ordinary court hours.

(c) The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.

[Para. (c) substituted by s. 8 (1) (b) of Act No. 62 of 2000.]

Wording of Sections

(d) The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if—

(i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;

(ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A);

(iii)

[Sub-para. (iii) deleted by s. 8 (1) (c) of Act No. 62 of 2000.]

Wording of Sections

(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to—

(aa) procure material evidence that may be lost if bail is granted; or

(bb) perform the functions referred to in section 37; or

(v) it appears to the court that it is necessary in the interests of justice to do so.

[Sub-s. (6) added by s. 1 (b) of Act No. 75 of 1995 and substituted by s. 1 (b) of Act No. 85 of 1997.]

Wording of Sections

(7)

[Sub-s. (7) added by s. 1 (b) of Act No. 75 of 1995 and deleted by s. 1 (c) of Act No. 85 of 1997.]

Wording of Sections

51. Escaping and aiding escaping before incarceration, and penalties therefor.—(1) Any person who escapes or attempts to escape from custody after he has been lawfully arrested and before he has been lodged in any prison, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section 48 of the Prisons Act, 1959 (Act 8 of 1959).

(2) Any person who rescues or attempts to rescue from custody any person after he has been lawfully arrested and before he has been lodged in any prison, police-cell or lock-up, or who aids such person to escape or to attempt to escape from such custody, or who harbours or conceals or assists in harbouring or concealing any person who escapes from custody after he has been lawfully arrested and before he has been lodged in any prison, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section 43 of the said Prisons Act, 1959.

(3) Notwithstanding anything to the contrary in any law contained, a lower court shall have jurisdiction to try any offence under this section and to impose any penalty prescribed in respect thereof.

52. Saving of other powers of arrest.—No provision of this Chapter relating to arrest shall be construed as removing or diminishing any authority expressly conferred by any other law to arrest, detain or put any restraint upon any person.

53. Saving of civil law rights and liability.—Subject to the provisions of sections 46 and 331, no provision of this Chapter relating to arrest shall be construed as removing or diminishing any civil right or liability of any person in respect of a wrongful or malicious arrest.

CHAPTER 6 SUMMONS

54. Summons as method of securing attendance of accused in magistrate's court.—(1) Where the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge, together with information relating to the name and, where known and where applicable, the residential address and occupation or status of the accused, to the clerk of the court who shall—

- (a) issue a summons containing the charge and the information handed to him by the prosecutor, and specifying the place, date and time for the appearance of the accused in court on such charge; and
- (b) deliver such summons, together with so many copies thereof as there are accused to be summoned, to a person empowered to serve a summons in criminal proceedings.

(2) (a) Except where otherwise expressly provided by any law, the summons shall be served

by a person referred to in subsection (1) (b) by delivering it to the person named therein or, if he cannot be found, by delivering it at his residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there.

(b) A return by the person who served the summons that the service thereof has been effected in terms of paragraph (a), may, upon the failure of the person concerned to attend the relevant proceedings, be handed in at such proceedings and shall be *prima facie* proof of such service.

(3) A summons under this section shall be served on an accused so that he is in possession thereof at least fourteen days (Sundays and public holidays excluded) before the date appointed for the trial.

55. Failure of accused to appear on summons.—(1) An accused who is summoned under section 54 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied from the return of service referred to in paragraph (b) of section 54 (2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and unless the accused satisfies the court that his failure was not due to any fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months: Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant—

- (a) may, where it appears to him that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72; or
- (b) shall, where it appears to him that the accused did not receive the summons in question or that the accused has paid an admission of guilt fine in terms of section 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose he may require the accused to furnish an affidavit or affirmation,

release the accused on warning under section 72 in respect of the offence of failing to appear in answer to the summons, whereupon the provisions of that section shall *mutatis mutandis* apply with reference to the said offence.

[Sub-s. (2) amended by s. 5 (a) of Act No. 33 of 1986.]

Wording of Sections

(2A) (a) If the court issues a warrant of arrest in terms of subsection (2) in respect of a summons which is endorsed in accordance with section 57 (1) (a)—

- (i) an endorsement to the same effect shall be made on the warrant in question;
- (ii) the court may make a further endorsement on the warrant to the effect that the accused may admit his guilt in respect of the failure to appear in answer to the summons or to remain in attendance at the criminal proceedings, and that he may upon arrest pay to a clerk of the court or at a police station a fine stipulated on the warrant in respect of such failure, which fine shall not exceed the amount to be imposed in terms of subsection (2), without appearing in court.

(b) The fine paid in terms of paragraph (a) at a police station or to a clerk of a magistrate's court other than the magistrate's court which issued the warrant of arrest, shall, as soon as is

expedient, together with the warrant of arrest in question, be forwarded to the clerk of the court which issued that warrant, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such admission of guilt in the criminal record book for admission of guilt, whereupon the accused concerned shall be deemed to have been convicted by the court in respect of the offence in question.

[Sub-s. (2A) inserted by s. 5 (b) of Act No. 33 of 1986 and substituted by s. 3 of Act No. 4 of 1992.]

Wording of Sections

(3) (a) If, in any case in which a warrant of arrest is issued, it was permissible for the accused in terms of section 57 to admit his guilt in respect of the summons on which he failed to appear and to pay a fine in respect thereof without appearing in court, and the accused is arrested under such warrant in the area of jurisdiction of a magistrate's court other than the magistrate's court which issued the warrant of arrest, such other magistrate's court may, notwithstanding any provision of this Act or any other law to the contrary, and if satisfied that the accused has, since the date on which he failed to appear on the summons in question, admitted his guilt in respect of that summons and has paid a fine in respect thereof without appearing in court, in a summary manner enquire into his failure to appear on such summons and, unless the accused satisfies the court that his failure was not due to any fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Para. (a) substituted by s. 14 of Act 59 of 1983 and by s. 5 (c) of Act 33 of 1986.]

Wording of Sections

(b) In proceedings under paragraph (a) before such other magistrate's court, it shall be presumed, upon production in such court of the relevant warrant of arrest, that the accused failed to appear on the summons in question, unless the contrary is proved.

CHAPTER 7

WRITTEN NOTICE TO APPEAR IN COURT

56. Written notice as method of securing attendance of accused in magistrate's court.—(1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall—

- (a) specify the name, the residential address and the occupation or status of the accused;
- (b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;
- (c) contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court; and
- (d) contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.

[Sub-s. (1) amended by s. 2 of Act No. 109 of 1984 and by s. 5 of Act No. 5 of 1991.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

(2) If the accused is in custody, the effect of a written notice handed to him under subsection (1) shall be that he be released forthwith from custody.

(3) The peace officer shall forthwith forward a duplicate original of the written notice to the clerk of the court which has jurisdiction.

(4) The mere production to the court of the duplicate original referred to in subsection (2) shall be *prima facie* proof of the issue of the original thereof to the accused and that such original was handed to the accused.

(5) The provisions of section 55 shall *mutatis mutandis* apply with reference to a written notice handed to an accused under subsection (1).

CHAPTER 8 ADMISSION OF GUILT FINE

57. Admission of guilt and payment of fine without appearance in court.—(1) Where—

- (a) a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may admit his guilt in respect of the offence in question and that he may pay a fine stipulated on the summons in respect of such offence without appearing in court; or

[Para. (a) substituted by s. 3 (a) of Act No. 109 of 1984 and by s. 6 (a) of Act No. 5 of 1991.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

- (b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer,

the accused may, without appearing in court, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

(2) (a) The summons or the written notice may stipulate that the admission of guilt fine shall be paid before a date specified in the summons or written notice, as the case may be.

(b) An admission of guilt fine may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.

(3) (a) (i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an admission of guilt fine in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment of the fine.

(ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document—

- (aa) is not available at the place of payment referred to in subsection (1), the accused

shall surrender a copy of the summons or written notice, as the case may be, at the time of the payment of the fine; or

- (bb) is available at the place of payment referred to in subsection (1), the admission of guilt fine may be accepted without the surrender of a copy of the summons or written notice, as the case may be.

(iii) If an accused in respect of whom a warrant has been endorsed in terms of section 55 (2A) intends to pay the relevant admission of guilt fine, the clerk of the court may, after he has satisfied himself that the warrant is so endorsed, accept the admission of guilt fine without the surrender of the summons, written notice or copy thereof, as the case may be.

[Para. (a) substituted by s. 2 (a) of Act No. 26 of 1987.]

Wording of Sections

(b) A copy referred to in paragraph (a) (ii) may be obtained by the accused at the magistrate's court, police station or local authority where the copy of the summons or written notice in question known as the control document is filed.

(c) Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a) (iii) may pay the admission of guilt fine in question to the clerk of the court where he appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he shall transfer such admission of guilt fine to the latter clerk of the magistrate's court.

[Sub-s. (3) substituted by s. 6 of Act No. 33 of 1986. Para. (c) substituted by s. 2 (b) of Act No. 26 of 1987.]

Wording of Sections

(4) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown.

(5) (a) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of noncommissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.

(b) An admission of guilt fine determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the *Gazette*, whichever is the lesser.

[Para. (b) substituted by s. 3 (b) of Act No. 109 of 1984 and by s. 6 (b) of Act No. 5 of 1991.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

(6) An admission of guilt fine paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.

(7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned.

57A. Admission of guilt and payment of fine after appearing in court.—(1) If an accused who is alleged to have committed an offence has appeared in court and is—

- (a) in custody awaiting trial on that charge and not on another more serious charge;
- (b) released on bail under section 59 or 60; or
- (c) released on warning under section 72,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again.

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

(2) Such notice shall contain—

- (a) the case number;
- (b) a certificate under the hand of the prosecutor or peace officer affirming that he or she handed or delivered, as the case may be, the original of such notice to the accused and that he or she explained to the accused the import thereof; and
- (c) the particulars and instructions contemplated in paragraphs (a) and (b) of section 56(1).

(3) The public prosecutor shall endorse the charge-sheet to the effect that a notice contemplated in this section has been issued and he or she or the peace officer, as the case may be, shall forthwith forward a duplicate original of the notice to the clerk of the court which has jurisdiction.

(4) The provisions of sections 55, 56(2) and (4) and 57(2) to (7), inclusive, shall apply *mutatis mutandis* to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated in such written notice were also the admission of guilt fine contemplated in that section.

[S. 57A inserted by s. 1 of Act No. 86 of 1996.]

CHAPTER 9 BAIL

58. Effect of bail.—The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60 (11) (a) or (b), as the case may be, and the court shall take into account—

- (a) the fact that the accused has been convicted of that offence; and
- (b) the likely sentence which the court might impose.

[S. 58 amended by s. 2 of Act No. 85 of 1997.]

Wording of Sections

59. Bail before first appearance of accused in lower court.—(1) (a) An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

[Para. (a) substituted by s. 3 of Act No. 26 of 1987, by s. 1 of Act No. 126 of 1992 and by s. 2 of Act No. 75 of 1995.]

Wording of Sections

(b) The police official referred to in paragraph (a) shall, at the time of releasing the accused on bail, complete and hand to the accused a recognizance on which a receipt shall be given for the sum of money deposited as bail and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused are entered.

(c) The said police official shall forthwith forward a duplicate original of such recognizance to the clerk of the court which has jurisdiction.

(2) Bail granted under this section shall, if it is of force at the time of the first appearance of the accused in a lower court, but subject to the provisions of section 62, remain in force after such appearance in the same manner as bail granted by the court under section 60 at the time of such first appearance.

59A. Attorney-general may authorise release on bail.—(1) An attorney-general, or a prosecutor authorised thereto in writing by the attorney-general concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

(2) For the purposes of exercising the functions contemplated in subsections (1) and (3) an attorney-general may, after consultation with the Minister, issue directives.

(3) The effect of bail granted in terms of this section is that the person who is in custody shall

be released from custody—

- (a) upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail at his or her place of detention contemplated in section 50 (1) (a);
- (b) subject to reasonable conditions imposed by the attorney-general or prosecutor concerned; or
- (c) the payment of such sum of money or the furnishing of such guarantee to pay and the imposition of such conditions.

(4) An accused released in terms of subsection (3) shall appear on the first court day at the court and at the time determined by the attorney-general or prosecutor concerned and the release shall endure until he or she so appears before the court on the first court day.

(5) The court before which a person appears in terms of subsection (4)—

- (a) may extend the bail on the same conditions or amend such conditions or add further conditions as contemplated in section 62; or
- (b) shall, if the court does not deem it appropriate to exercise the powers contemplated in paragraph (a), consider the bail application and, in considering such application, the court has the jurisdiction relating to the powers, functions and duties in respect of bail proceedings in terms of section 60.

(6) The provisions of section 64 with regard to the recording of bail proceedings by a court apply, with the necessary changes, in respect of bail granted in terms of this section.

(7) For all purposes of this Act, but subject to the provisions of this section, bail granted in terms of this section shall be regarded as bail granted by a court in terms of section 60.

[S. 59A inserted by s. 3 of Act No. 85 of 1997.]

60. Bail application of accused in court.—(1) (a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

[Para. (a) substituted by s. 9 (a) of Act No. 62 of 2000.]

Wording of Sections

(b) Subject to the provisions of section 50 (6) (c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

[Para. (b) substituted by s. 4 (a) of Act No. 85 of 1997 and by s. 5 (a) of Act No. 34 of 1998.]

Wording of Sections

(c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.

(2) In bail proceedings the court—

- (a) may postpone any such proceedings as contemplated in section 50 (6);
- (b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;
- (c) may, in respect of matters that are in dispute between the accused and the prosecutor,

require of the prosecutor or the accused, as the case may be, that evidence be adduced;

- (d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11) (a) and (b), require of the prosecutor to place on record the reasons for not opposing the bail application.

[Sub-s. (2) substituted by s. 4 (b) of Act No. 85 of 1997.]

Wording of Sections

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;

[Para. (a) substituted by s. 4 (c) of Act No. 85 of 1997.]

Wording of Sections

- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;

[S. 4 amended by s. 9 (b) of Act No. 62 of 2000. Para. (e) inserted by s. 4 (d) of Act No. 85 of 1997.]

Wording of Sections

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to any person;
- (c) any resentment the accused is alleged to harbour against any person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
- (h) any other factor which in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4) (b) has been established, the court

may, where applicable, take into account the following factors, namely—

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed; or
- (h) any other factor which in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4) (d) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which in the opinion of the court should be taken into account.

(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardized by his or her release;
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.

[Sub-s. (8A) inserted by s. 4 (e) of Act No. 85 of 1997.]

(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account.

(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

[Sub-s. (11) substituted by s. 4 (f) of Act No. 85 of 1997.]

Wording of Sections

(11A) (a) If the attorney-general intends charging any person with an offence referred to in Schedule 5 or 6 the attorney-general may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.

(b) The written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court.

(c) Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by an attorney-general under paragraph (a) shall, upon its mere production at such application or proceedings, be *prima facie* proof of the charge to be brought against that person.

[Sub-s. (11A) inserted by s. 4 (g) of Act No. 85 of 1997.]

(11B) (a) In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether—

- (i) the accused has previously been convicted of any offence; and
- (ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

(b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.

(c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

(d) An accused who wilfully—

- (i) fails or refuses to comply with the provisions of paragraph (a); or
- (ii) furnishes the court with false information required in terms of paragraph (a),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

[Sub-s. (11B) inserted by s. 4 (g) of Act No. 85 of 1997.]

(12) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

(13) The court releasing an accused on bail in terms of this section, may order that the accused—

- (a) deposit with the clerk of the court or the registrar of the court, as the case may be, or with a correctional official at the prison where the accused is in custody or with a police official at the place where the accused is in custody, the sum of money determined by the court in question; or
- (b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or reduced in terms of section 63 (1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

[S. 60 amended by s. 2 of Act No. 64 of 1982 and by s. 2 of Act No. 56 of 1979 and substituted

by s. 3 of Act No. 75 of 1995.]

Wording of Sections

(14) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.

[S. 60 amended by s. 2 of Act No. 56 of 1979 and by s. 2 of Act No. 64 of 1982 and substituted by s. 3 of Act No. 75 of 1995. Sub-s. (14) added by s. 4 (h) of Act No. 85 of 1997 and amended by s. 5 (b) of Act No. 34 of 1998.]

Wording of Sections

61.

[S. 61 repealed by s. 4 of Act No. 75 of 1995.]

Wording of Sections

62. Court may add further conditions of bail.—Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail—

- (a) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;
- (b) with regard to any place to which the accused is forbidden to go;
- (c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;
- (d) with regard to the place at which any document may be served on him under this Act;
- (e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;
- (f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

[Para. (f) added by s. 38 of Act No. 122 of 1991.]

63. Amendment of conditions of bail.—(1) Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application.

[Sub-s. (1) substituted by s. 5 of Act No. 75 of 1995.]

Wording of Sections

(2) If the court referred to in subsection (1) is a superior court, an application under that subsection may be made to any judge of that court if the court is not sitting at the time of the application.

63A. Release or amendment of bail conditions of accused on account of prison

conditions.—(1) If a Head of Prison contemplated in the Correctional Services Act, 1998 (Act No. 111 of 1998), is satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused—

- (a) who is charged with an offence falling within the category of offences—
 - (i) for which a police official may grant bail in terms of section 59; or
 - (ii) referred to in Schedule 7;
- (b) who has been granted bail by any lower court in respect of that offence, but is unable to pay the amount of bail concerned; and
- (c) who is not also in detention in respect of any other offence falling outside the category of offences referred to in paragraph (a),

that Head of Prison may apply to the said court for the—

- (aa) release of the accused on warning in lieu of bail; or
- (bb) amendment of the bail conditions imposed by that court on the accused.

(2) (a) An application contemplated in subsection (1) must be lodged in writing with the clerk of the court, and must—

- (i) contain an affidavit or affirmation by the Head of Prison to the effect that he or she is satisfied that the prison population of the prison concerned is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of the accused concerned; and
- (ii) contain a written certificate by the Director of Public Prosecutions concerned, or a prosecutor authorised thereto by him or her in writing, to the effect that the prosecuting authority does not oppose the application.

(b) The accused and his or her legal representative, if any, must be notified of an application referred to in subsection (1).

(c) The clerk of the court must, without delay, cause the application to be placed before any magistrate or regional magistrate, as the case may be, who may consider the application in chambers.

(d) The application may be considered in the presence of the accused if the magistrate or regional magistrate deems it necessary.

(3) (a) If the magistrate or regional magistrate is satisfied that the application complies with the requirements set out in subsection (2) (a), he or she may—

- (i) order the release of the accused from custody and, if the accused is present, warn him or her to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the offence in question, and the court may, at the time of such order or at any time thereafter, impose any condition referred to in section 62 in connection with such release; or
- (ii) reduce the amount of bail determined under section 60 and, if deemed appropriate, amend or supplement any condition imposed under section 60 or 62.

(b) If the accused is absent when an order referred to in paragraph (a) (i) is made or when bail conditions are amended in terms of paragraph (a) (ii), a correctional official duly authorised by the Head of the prison where the accused is in custody must—

- (i) hand to the accused a certified copy of the said order or of the bail conditions as amended and explain to the accused the import thereof; and

- (ii) return to the clerk of the court a certificate under the hand of that official and signed by the accused, that he or she has handed the certified copy of such order or conditions to the accused and that he or she has explained to the accused the import thereof,

and the mere production to the court of the said certificate shall be *prima facie* proof that the said certified copy was handed and explained to the accused.

(c) The provisions of section 72 (2) (a) apply, with the necessary changes, in respect of an accused released in terms of paragraph (a) (i).

(4) (a) The National Director of Public Prosecutions may, in consultation with the Commissioner of Correctional Services, issue directives regarding—

- (i) the establishment of monitoring and consultative mechanisms for bringing an application contemplated in subsection (1); and
- (ii) the procedure to be followed by a Head of Prison and a Director of Public Prosecutions whenever it appears that it is necessary to bring an application contemplated in subsection (1).

(b) Any directives issued in terms of paragraph (a) must be submitted to Parliament before they take effect.

[S. 63A inserted by s. 6 of Act No. 42 of 2001.]

64. Proceedings with regard to bail and conditions to be recorded in full.—The court dealing with bail proceedings as contemplated in section 50 (6) or which considers bail under section 60 or which imposes any further condition under section 62 or which, under section 63 or 63A, amends the amount of bail or amends or supplements any condition or refuses to do so, shall record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof, or shall cause such proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, shall, on its mere production in any court in which the relevant charge is pending, be *prima facie* proof of such conditions or any amendment or supplementation thereof.

[S. 64 substituted by s. 6 of Act No. 75 of 1995, by s. 5 of Act No. 85 of 1997 and by s. 7 of Act No. 42 of 2001.]

Wording of Sections

65. Appeal to superior court with regard to bail.—(1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

(b) The appeal may be heard by a single judge.

(c) A local division of the Supreme Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

(2) An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.

(3) The accused shall serve a copy of the notice of appeal on the attorney-general and on the magistrate or, as the case may be, the regional magistrate, and the magistrate or regional magistrate shall forthwith furnish the reasons for his decision to the court or judge, as the case may be.

(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.

65A. Appeal by attorney-general against decision of court to release accused on bail.—(1) (a) The attorney-general may appeal to the superior court having jurisdiction, against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65 (1) (a).

(b) The provisions of section 310A in respect of an application or appeal referred to in that section by an attorney-general, and the provisions of section 65 (1) (b) and (c) and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this subsection.

(2) (a) The attorney-general may appeal to the Appellate Division against a decision of a superior court to release an accused on bail.

(b) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this subsection.

(c) Upon an appeal in terms of paragraph (a) or an application referred to in paragraph (b) brought by an attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

(3) If the appeal of the attorney-general in terms of subsection (1) (a) or (2) (a) is successful, the court hearing the appeal shall issue a warrant for the arrest of the accused.

[S. 65A inserted by s. 7 of Act No. 75 of 1995.]

66. Failure by accused to observe condition of bail.—(1) If an accused is released on bail subject to any condition imposed under section 60 or 62, including any amendment or supplementation under section 63 of a condition of bail, and the prosecutor applies to the court before which the charge with regard to which the accused has been released on bail is pending, to lead evidence to prove that the accused has failed to comply with such condition, the court shall, if the accused is present and denies that he or she failed to comply with such condition or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

[Sub-s. (1) substituted by s. 8 of Act No. 75 of 1995.]

Wording of Sections

(2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and shall, when the accused appears before the court and denies that he failed to comply with the condition in question or that his failure to comply with such condition was due to fault on his part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(3) If the accused admits that he failed to comply with the condition in question or if the court finds that he failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the State.

(4) The proceedings and the evidence under this section shall be recorded.

67. Failure of accused on bail to appear.—(1) If an accused who is released on bail—

- (a) fails to appear at the place and on the date and at the time—
 - (i) appointed for his trial; or
 - (ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
- (b) fails to remain in attendance at such trial or at such proceedings,

the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

(c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.

(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.

67A. Criminal liability of a person who is on bail on the ground of failure to appear or to comply with a condition of bail.—Any person who has been released on bail and who fails without good cause to appear on the date and at the place determined for his or her appearance, or to remain in attendance until the proceedings in which he or she must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of section 60 or 62, including an amendment or supplementation thereof in terms of section 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year.

[S. 67A inserted by s. 9 of Act No. 75 of 1995.]

68. Cancellation of bail.—(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that—

- (a) the accused is about to evade justice or is about to abscond in order to evade justice;
- (b) the accused has interfered or threatened or attempted to interfere with witnesses;
- (c) the accused has defeated or attempted to defeat the ends of justice;
- (d) the accused poses a threat to the safety of the public or of a particular person;
- (e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
- (f) further evidence has since become available or factors have arisen, including the fact

that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or

(g) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be canceled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.

(2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that—

(a) he or she has reason to believe that—

(i) an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice;

(ii) the accused has interfered or threatened or attempted to interfere with witnesses;

(iii) the accused has defeated or attempted to defeat the ends of justice; or

(iv) the accused poses a threat to the safety of the public or of a particular person;

(b) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;

(c) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to release the accused on bail; or

(d) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.

[S. 68 substituted by s. 10 of Act No. 75 of 1995 and by s. 6 of Act No. 85 of 1997.]

Wording of Sections

68A. Cancellation of bail at request of accused.—Any court before which a charge is pending in respect of which the accused has been released on bail may, upon application by the accused, cancel the bail and refund the bail money if the accused is in custody on any other charge or is serving a sentence.

[S. 68A inserted by s. 15 of Act No. 59 of 1983.]

69. Payment of bail money by third person.—(1) No provision of section 59 or 60 shall prevent the payment by any person, other than the accused, of bail money for the benefit of the accused.

(2) Bail money, whether deposited by an accused or any other person for the benefit of the accused, shall, notwithstanding that such bail money or any part thereof may have been ceded to any person, be refunded only to the accused or the depositor, as the case may be.

(3) No person shall be allowed to deposit for the benefit of an accused any bail money in terms of this section if the official concerned has reason to believe that such person, at any time before or after depositing such bail money, has been indemnified or will be indemnified by any person in any manner against loss of such bail money or that he has received or will receive any financial benefit in

connection with the deposit of such bail money.

70. Remission of bail money.—The Minister or any officer acting under his or her authority or the court concerned may remit the whole or any part of any bail money forfeited under section 66 or 67.

[S. 70 substituted by s. 11 of Act No. 75 of 1995.]

Wording of Sections

71. Juvenile may be placed in place of safety or under supervision in lieu of release on bail or detention in custody.—If an accused under the age of eighteen years is in custody in respect of any offence, and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or court may, instead of releasing the accused on bail or detaining him in custody, place the accused in a place of safety as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983), or place him under the supervision of a probation officer or a correctional official, pending his appearance or further appearance before a court in respect of the offence in question or until he is otherwise dealt with in accordance with law.

[S. 71 substituted by s. 4 of Act No. 26 of 1987 and by s. 39 of Act No. 122 of 1991.]

Wording of Sections

CHAPTER 10 RELEASE ON WARNING

72. Accused may be released on warning in lieu of bail.—(1) If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2—

- (a) release the accused from custody and warn him to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the offence in question, and the said court may, at the time of such release or at any time thereafter, impose any condition referred to in section 62 in connection with such release;

[Para. (a) substituted by s. 7 (a) of Act No. 33 of 1986.]

Wording of Sections

- (b) in the case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he is, and warn such person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a), to see to it that the accused complies with that condition.

[Sub-s. (1) amended by s. 5 of Act No. 26 of 1987 and by s. 2 of Act No. 126 of 1992. Para. (b) substituted by s. 7 (b) of Act No. 33 of 1986.]

Wording of Sections

(2) (a) An accused who is released under subsection (1) (a) and who fails to appear or, as the case may be, to remain in attendance at the proceedings in accordance with a warning under that paragraph, or who fails to comply with a condition imposed under subsection (1) (a), shall be guilty of an offence and liable to the punishment prescribed under subsection (4).

(b) Any person in whose custody an accused is placed under subsection (1) (b) and who fails in terms of a warning under that subsection to bring the accused before court or to have the accused remain in attendance, or who fails to see to it that the accused complies with a condition referred to in subsection (1) (a), shall be guilty of an offence and liable to the punishment prescribed under subsection (4).

[Sub-s. (2) substituted by s. 7 (c) of Act No. 33 of 1986.]

Wording of Sections

(3) (a) A police official who releases an accused under subsection (1) (a) shall, at the time of releasing the accused, complete and hand to the accused and, in the case of subsection (1) (b), to the person in whose custody the accused is, a written notice on which shall be entered the offence in respect of which the accused is being released and the court before which and the time at which and the date on which the accused shall appear.

(b) A court which releases an accused under subsection (1) shall, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court and which sets out the warning relating to the court before which, the time at which and the date on which the accused is to appear or the conditions on which he was released, shall, on its mere production in any court in which the relevant charge is pending, be *prima facie* proof of such warning.

[Para. (b) substituted by s. 7 (d) of Act No. 33 of 1986.]

Wording of Sections

(4) The court may, if satisfied that an accused referred to in subsection (2) (a) or a person referred to in subsection (2) (b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Sub-s. (4) substituted by s. 7 (e) of Act No. 33 of 1986.]

Wording of Sections

[Editorial Note: The omission of words from s. 72 (4) has been declared inconsistent with the Constitution as set out in the Constitutional Court Order published under Government Notice No.

R.888 in *Government Gazette* 23535 of 28 June 2002. S. 72 (4) is to be read as though the words "there is a reasonable possibility that" appear therein between words "that" and "his failure". Provisos for not invalidating any application of the reverse onus created by the omission of the words declared to be unconstitutional and invalid, are also set out in this Court Order.]

72A. Cancellation of release on warning.—Notwithstanding the provisions of section 72 (4), the provisions of section 68 (1) and (2) in respect of an accused who has been granted bail, are, with the necessary changes, applicable in respect of an accused who has been released on warning.

[S. 72A inserted by s. 7 of Act No. 85 of 1997.]

CHAPTER 11 ASSISTANCE TO ACCUSED

73. Accused entitled to assistance after arrest and at criminal proceedings.—(1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the

management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

(2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

(2A) Every accused shall—

- (a) at the time of his or her arrest;
- (b) when he or she is served with a summons in terms of section 54;
- (c) when a written notice is handed to him or her in terms of section 56;
- (d) when an indictment is served on him or her in terms of section 144 (4) (a);
- (e) at his or her first appearance in court,

be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

[Sub-s. (2A) inserted by s. 2 of Act No. 86 of 1996.]

(2B) Every accused shall be given a reasonable opportunity to obtain legal assistance.

[Sub-s. (2B) inserted by s. 2 of Act No. 86 of 1996.]

(2C) If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may, in addition to any order which it may make in terms of section 342A, order that the trial proceed without legal representation unless the court is of the opinion that that would result in substantial injustice, in which event the court may, subject to the Legal Aid Act, 1969 (Act No. 22 of 1969), order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.

[Sub-s. (2C) inserted by s. 2 of Act No. 86 of 1996.]

(3) An accused who is under the age of eighteen years may be assisted by his parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.

74. Parent or guardian of accused under eighteen years to attend proceedings.—(1) Where an accused is under the age of eighteen years, a parent or, as the case may be, the guardian of the accused shall be warned, in accordance with the provisions of subsection (2), to attend the relevant criminal proceedings.

(2) The parent or the guardian of the accused, if such parent or guardian is known to be within the magisterial district in question and can be traced without undue delay, shall, for the purposes of subsection (1), be warned to attend the proceedings in question—

- (a) in any case in which the accused is arrested, by the peace officer effecting the arrest or, where the arrest is effected by a person other than a peace officer, the police official to whom the accused is handed over, and such peace officer or police official, as the case may be, shall inform the parent or guardian, as the case may be, of the place and date and time at which the accused is to appear; or
- (b) in the case of a summons under section 54 or a written notice under section 56, by the person serving the summons on or handing the written notice to the accused, and such

person shall serve a copy of such summons or written notice on the parent or guardian, as well as a notice warning the parent or guardian to attend the proceedings in question at the place and on the date and at the time specified in the summons or written notice.

(3) A parent or guardian who has been warned in terms of subsection (2), may apply to any magistrate of the court in which the accused is to appear for exemption from the obligation to attend the proceedings in question, and if such magistrate exempts such parent or guardian, he shall do so in writing.

(4) A parent or guardian who has been warned in terms of subsection (2) and who has not under subsection (3) been exempted from the obligation to attend the relevant proceedings, or a parent or guardian who is present at criminal proceedings and who is warned by the court to remain in attendance thereat, shall remain in attendance at the relevant criminal proceedings, whether in that court or any other court, unless excused by the court before which such proceedings are pending.

(5) If a parent or guardian has not been warned under subsection (2), the court before which the relevant proceedings are pending may at any time during the proceedings direct any person to warn the parent or guardian of the accused to attend such proceedings.

(6) A parent or guardian who has been warned under subsection (2), (4) or (5) and who fails to attend the proceedings in question or, as the case may be, who fails to remain in attendance at such proceedings in accordance with the provisions of subsection (4), shall be guilty of an offence and liable to the punishment prescribed under subsection (7).

(7) The court, if satisfied from evidence placed before it that a parent or guardian has been warned to attend the proceedings in question and that such parent or guardian has failed to attend such proceedings, or that a parent or guardian has failed to remain in attendance at such proceedings, may issue a warrant for the arrest of such parent or guardian and, when he is brought before the court, in a summary manner enquire into his failure to attend or to remain in attendance, and, unless such parent or guardian satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Sub-s. (7) substituted by s. 8 of Act No. 33 of 1986.]

Wording of Sections

CHAPTER 12 SUMMARY TRIAL

75. Summary trial and court of trial.—(1) When an accused is to be tried in a court in respect of an offence, he shall, subject to the provisions of sections 119, 122A and 123, be tried at a summary trial in—

- (a) a court which has jurisdiction and in which he appeared for the first time in respect of such offence in accordance with any method referred to in section 38;
- (b) a court which has jurisdiction and to which he was referred to under subsection (2); or
- (c) any other court which has jurisdiction and which has been designated by the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, for the purposes of such summary trial.

[Para. (c) substituted by s. 9 of Act No. 33 of 1986.]

Wording of Sections

(2) (a) If an accused appears in a court which does not have jurisdiction to try the case, the accused shall at the request of the prosecutor be referred to a court having jurisdiction.

(b) If an accused appears in a magistrate's court and the prosecutor informs the court that he

or she is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of a regional court, the court shall if so requested by the prosecutor refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge.

[Sub-s. (2) amended by s. 3 of Act No. 86 of 1996.]

Wording of Sections

(3) The court before whom an accused appears for the purposes of a bail application shall, at the conclusion of the bail proceedings or at any stage thereafter, but before the accused has pleaded, refer such accused to a court designated by the prosecutor for purposes of trial.

[S. 75 substituted by s. 3 of Act No. 56 of 1979. Sub-s (3) added by s. 8 of Act No. 85 of 1997.]

Wording of Sections

76. Charge-sheet and proof of record of criminal case.—(1) Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk of the court, and, in the case of a superior court, by serving an indictment referred to in section 144 on the accused and the lodging thereof with the registrar of the court concerned.

(2) The charge-sheet shall in addition to the charge against the accused include the name and, where known and where applicable, the address and description of the accused with regard to sex, nationality and age.

[Sub-s. (2) substituted by s. 13 of Act No. 139 of 1992.]

Wording of Sections

(3) (a) The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge-sheet, summons or indictment shall form part thereof.

(b) Such record may be proved in a court by the mere production thereof or of a copy thereof in terms of section 235.

(c) Where the correctness of any such record is challenged, the court in which the record is challenged may, in order to satisfy itself whether any matter was correctly recorded or not, either orally or on affidavit hear such evidence as it may deem necessary.

CHAPTER 13

ACCUSED: CAPACITY TO UNDERSTAND PROCEEDINGS: MENTAL ILLNESS AND CRIMINAL RESPONSIBILITY

77. Capacity of accused to understand proceedings.—(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(1A) At proceedings in terms of sections 77 (1) and 78 (2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 3B of the Legal Aid Amendment Act, 1996 (Act No. 20 of 1996).

[Sub-s. (1A) inserted by s. 3 (a) of Act No. 68 of 1998.]

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by

the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(3) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(4) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 has enquired into the mental condition of the accused.

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.

(6) (a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused—

- (i) in the case of a charge of murder or culpable homicide or rape or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 29 (1) (a) of the Mental Health Act, 1973 (Act No. 18 of 1973); or
 - (ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence—
 - (aa) be admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act No. 18 of 1973); or
 - (bb) be treated as an out-patient in terms of section 7 of that Act,
- pending discharge by a hospital board in terms of section 29 (4A) (a) of that Act or an order that he or she shall no longer be treated as an out-patient,

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106 (4) to be acquitted or to be convicted in respect of the charge in question.

[Para. (a) amended by s. 9 of Act No. 51 of 1991 and substituted by s. 42 (a) of Act No. 129 of 1993 and by s. 3 (b) of Act No. 68 of 1998.]

Wording of Sections

(b) If the court makes a finding in terms of paragraph (a) after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside, and if the accused has pleaded guilty it shall be deemed that he has pleaded not guilty.

[Sub-s. (6) substituted by s. 10 of Act No. 33 of 1986.]

Wording of Sections

(7) Where a direction is issued in terms of subsection (6) or (9), the accused may at any time thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

[Sub-s. (7) amended by s. 9 of Act No. 51 of 1991 and substituted by s. 42 (b) of Act No. 129 of 1993 and by s. 3 (c) of Act No. 68 of 1998.]

Wording of Sections

(8) (a) An accused against whom a finding is made—

- (i) under subsection (5) and who is convicted;
- (ii) under subsection (6) and against whom the finding is not made in consequence of an allegation by the accused under subsection (1),

may appeal against such finding.

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding in terms of subsection (5) is allowed, the court of appeal shall set aside the conviction and sentence and direct that the person concerned be detained in accordance with the provisions of subsection (6).

[Sub-s. (9) amended by s. 9 of Act No. 51 of 1991 and substituted by s. 42 (c) of Act No. 129 of 1993 and by s. 3 (d) of Act No. 68 of 1998.]

Wording of Sections

(10) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the direction issued under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary way.

78. Mental illness or mental defect and criminal responsibility.—(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable—

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

[Sub-s. (1) substituted by s. 5 (a) of Act No. 68 of 1998.]

Wording of Sections

(1A) Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.

[Sub-s. (1A) inserted by s. 5 (b) of Act No. 68 of 1998.]

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

[Sub-s. (1B) inserted by s. 5 (b) of Act No. 68 of 1998.]

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[Sub-s. (2) substituted by s. 5 (c) of Act No. 68 of 1998.]

Wording of Sections

(3) If the finding contained in the relevant report is the unanimous finding of the persons who

under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(5) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 enquired into the mental condition of the accused.

(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act—

- (a) the court shall find the accused not guilty; or
- (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or mental defect, as the case may be, and direct—

- (i) in a case where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—
 - (aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 29 (1) (a) of the Mental Health Act, 1973 (Act No. 18 of 1973);
 - (bb) admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act No. 18 of 1973), pending discharge by a hospital board in terms of section 29 (4A) (a) of that Act;
 - (cc) treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;
 - (dd) released subject to such conditions as the court considers appropriate; or
 - (ee) released unconditionally;
- (ii) in any other case than a case contemplated in subparagraph (i), that the accused—
 - (aa) be admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act No. 18 of 1973), pending discharge by a hospital board in terms of section 29 (4A) (a) of that Act;
 - (bb) be treated as an out-patient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;
 - (cc) be released subject to such conditions as the court considers appropriate; or
 - (dd) be released unconditionally.

[Sub-s. (6) substituted by s. 11 of Act No. 33 of 1986, amended by s. 9 of Act No. 51 of 1991 and by s. 43 of Act No. 129 of 1993 and substituted by s. 5 (d) of Act No. 68 of 1998.]

Wording of Sections

(7) If the court finds that the accused at the time of the commission of the act in question was

criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

(8) (a) An accused against whom a finding is made under subsection (6) may appeal against such finding if the finding is not made in consequence of an allegation by the accused under subsection (2).

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the finding and the direction under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary course.

79. Panel for purposes of enquiry and report under sections 77 and 78.—(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on—

- (a) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or
- (b) where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs—
 - (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;
 - (ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State;
 - (iii) by a psychiatrist appointed for the accused by the court; and
 - (iv) by a clinical psychologist where the court so directs.

[Sub-s. (1) amended by s. 44 of Act No. 129 of 1993 and by s. 28 (a) and (b) of Act 105 of 1997 and substituted by s. 6 (a) of Act No. 68 of 1998.]

Wording of Sections

(1A) The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court shall provide the persons who, in terms of subsection (1), have to conduct the enquiry and report on the accused's mental capacity with a report in which the following are stated, namely—

- (a) whether the referral is taking place in terms of section 77 or 78;
- (b) at whose request or on whose initiative the referral is taking place;
- (c) the nature of the charge against the accused;
- (d) the stage of the proceedings at which the referral took place;
- (e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;
- (f) the purport of evidence that has been given that is relevant to the accused's mental

condition or mental capacity;

- (g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her near relatives; and
- (h) any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity.

[Sub-s. (1A) inserted by s. 6 (b) of Act No. 68 of 1998.]

(2) (a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.

[Para. (b) added by s. 4 of Act No. 4 of 1992.]

(c) The court may make the following orders after the enquiry referred to in subsection (1) has been conducted—

- (i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine;
- (ii) refer the accused at the request of the prosecutor to the court referred to in section 77 (6) which has jurisdiction to try the case;
- (iii) make any other order it deems fit regarding the custody of the accused; or
- (iv) any other order.

[Sub-s. (2) amended by s. 44 of Act No. 129 of 1993. Para. (c) added by s. 6 (c) of Act No. 68 of 1998.]

Wording of Sections

(3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused.

(4) The report shall—

- (a) include a description of the nature of the enquiry; and
- (b) include a diagnosis of the mental condition of the accused; and
- (c) if the enquiry is made under section 77 (1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or
- (d) if the enquiry is in terms of section 78 (2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause.

[Para. (d) substituted by s. 6 (d) of Act No. 68 of 1998.]

Wording of Sections

(5) If the persons conducting the relevant enquiry are not unanimous in their finding under paragraph (c) or (d) of subsection (4), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.

(6) Subject to the provisions of subsection (7), the contents of the report shall be admissible in evidence at criminal proceedings.

(7) A statement made by an accused at the relevant enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.

(8) A psychiatrist and a clinical psychologist appointed under subsection (1), other than a psychiatrist and a clinical psychologist appointed for the accused, shall, subject to the provisions of subsection (10), be appointed from the list of psychiatrists and clinical psychologists referred to in subsection (9) (a).

[Sub-s. (8) substituted by s. 8 (a) of Act No. 42 of 2001.]

Wording of Sections

(9) The Director-General: Health shall compile and keep a list of—

(a) psychiatrists and clinical psychologists who are prepared to conduct any enquiry under this section; and

(b) psychiatrists who are prepared to conduct any enquiry under section 286A (3),

and shall provide the registrars of the High Courts and all clerks of magistrates' courts with a copy thereof.

[Sub-s. (9) substituted by s. 17 of Act No. 116 of 1993 and by s. 8 (b) of Act No. 42 of 2001.]

Wording of Sections

(10) Where the list compiled and kept under subsection (9) (a) does not include a sufficient number of psychiatrists and clinical psychologists who may conveniently be appointed for any enquiry under this section, a psychiatrist and clinical psychologist may be appointed for the purposes of such enquiry notwithstanding that his or her name does not appear on such list.

[Sub-s. (10) substituted by s. 8 (c) of Act No. 42 of 2001.]

Wording of Sections

(11) (a) A psychiatrist or clinical psychologist designated or appointed under subsection (1) by or at the request of the court to enquire into the mental condition of an accused and who is not in the full-time service of the State, shall be compensated for his or her services in connection with the enquiry from public funds in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.

(b) A psychiatrist appointed under subsection (1) (b) (iii) for the accused to enquire into the mental condition of the accused and who is not in the full-time service of the State, shall be compensated for his or her services from public funds in the circumstances and in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.

[Sub-s. (11) substituted by s. 8 (d) of Act No. 42 of 2001.]

Wording of Sections

(12) For the purposes of this section a psychiatrist or a clinical psychologist means a person registered as a psychiatrist or a clinical psychologist under the Health Professions Act, 1974 (Act No. 56 of 1974).

[Sub-s. (12) substituted by s. 8 (e) of Act No. 42 of 2001.]

Wording of Sections

CHAPTER 14 THE CHARGE

80. Accused may examine charge.—An accused may examine the charge at any stage of the relevant criminal proceedings.

81. Joinder of charges.—(1) Any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge, and where several charges are so joined, each charge shall be numbered consecutively.

(2) (a) The court may, if in its opinion it will be in the interests of justice to do so, direct that an accused be tried separately in respect of any charge joined with any other charge.

(b) An order under paragraph (a) may be made before or during a trial, and the effect thereof shall be that the charge in respect of which an accused is not then tried, shall be proceeded with in all respects as if the accused had in respect thereof been charged separately.

82. Several charges to be disposed of by same court.—Where an accused is in the same proceedings charged with more than one offence, and any one charge is for any reason to be disposed of by a regional court or a superior court, all the charges shall be disposed of by the same court in the same proceedings.

83. Charge where it is doubtful what offence committed.—If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.

84. Essentials of charge.—(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.

85. Objection to charge.—(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground—

- (a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;
- (b) that the charge does not set out an essential element of the relevant offence;
- (c) that the charge does not disclose an offence;
- (d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court; or

[Para. (d) amended by s. 14 of Act No. 139 of 1992.]

Wording of Sections

(e) that the accused is not correctly named or described in the charge:

Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(2) (a) If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.

(b) Where the prosecution fails to comply with an order under paragraph (a), the court may quash the charge.

86. Court may order that charge be amended.—(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.

(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.

(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.

87. Court may order delivery of particulars.—(1) An accused may at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge, and the court before which a charge is pending may at any time before any evidence in respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge, and may, if necessary, adjourn the proceedings in order that such particulars may be delivered: Provided that the provisions of this subsection shall not apply at the stage when an accused is required in terms of section 119 or 122A to plead to a charge in the magistrate's court.

[Sub-s. (1) amended by s. 15 of Act No. 139 of 1992.]

Wording of Sections

(2) The particulars shall be delivered to the accused without charge and shall be entered in the record, and the trial shall proceed as if the charge had been amended in conformity with such particulars.

(3) In determining whether a particular is required or whether a defect in the indictment before a superior court is material to the substantial justice of the case, the court may have regard to the

summary of the substantial facts under paragraph (a) of section 144 (3) or, as the case may be, the record of the preparatory examination.

88. Defect in charge cured by evidence.—Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.

89. Previous conviction not to be alleged in charge.—Except where the fact of a previous conviction is an element of any offence with which an accused is charged, it shall not in any charge be alleged that an accused has previously been convicted of any offence, whether in the Republic or elsewhere.

90. Charge need not specify or negative exception, exemption, proviso, excuse or qualification.—In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negated in the charge and, if so specified or negated, need not be proved by the prosecution.

91. Charge need not state manner or means of act.—A charge need not set out the manner in which or the means or instrument by which any act was done, unless the manner, means or instrument is an essential element of the relevant offence.

92. Certain omissions or imperfections not to invalidate charge.—(1) A charge shall not be held defective—

- (a) for want of the averment of any matter which need not be proved;
- (b) because any person mentioned in the charge is designated by a name of office or other descriptive appellation instead of by his proper name;
- (c) because of an omission, in any case where time is not of the essence of the offence, to state the time at which the offence was committed;
- (d) because the offence is stated to have been committed on a day subsequent to the laying of the complaint or the service of the charge or on an impossible day or on a day that never happened;
- (e) for want of, or imperfection in, the addition of any accused or any other person;
- (f) for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury or spoil is not of the essence of the offence.

(2) If any particular day or period is alleged in any charge to be the day on which or the period during which any act or offence was committed, proof that such act or offence was committed on any day or during any other period not more than three months before or after the day or period alleged therein shall be taken to support such allegation if time is not of the essence of the offence: Provided that—

- (a) proof may be given that the act or offence in question was committed on a day or during a period more than three months before or after the day or period stated in the charge unless it is made to appear to the court before which the proceedings are pending that the accused is likely to be prejudiced thereby in his defence on the merits;
- (b) if the court considers that the accused is likely to be prejudiced thereby in his defence

on the merits, it shall reject such proof, and the accused shall be deemed not to have pleaded to the charge.

93. Alibi and date of act or offence.—If the defence of an accused is an alibi and the court before which the proceedings are pending is of the opinion that the accused may be prejudiced in making such defence if proof is admitted that the act or offence in question was committed on a day or at a time other than the day or time stated in the charge, the court shall reject such proof notwithstanding that the day or time in question is within a period of three months before or after the day or time stated in the charge, whereupon the same consequences shall follow as are mentioned in proviso (b) of section 92 (2).

94. Charge may allege commission of offence on divers occasions.—Where it is alleged that an accused on divers occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on divers occasions during a stated period.

95. Rules applicable to particular charges.—(1) A charge relating to a testamentary instrument need not allege that the instrument is the property of any person.

(2) A charge relating to anything fixed in a square, street or open place or in a place dedicated to public use or ornament, or relating to anything in a public place or office or taken therefrom, need not allege that the thing in question is the property of any person.

(3) A charge relating to a document which is the evidence of title to land or of an interest in land may describe the document as being the evidence of the title of the person or of one of the persons having an interest in the land to which the document relates, and shall describe the land or any relevant part thereof in a manner sufficient to identify it.

(4) A charge relating to the theft or anything leased to the accused may describe the thing in question as the property of the person who leased it to the accused.

(5) A charge against a person in the public service for an offence committed in connection with anything which came into his possession by virtue of his employment may describe the thing in question as the property of the State.

(6) A charge relating to anything in the possession or under the control of any public officer may describe the thing in question as being in the lawful possession or under the lawful control of such officer without referring to him by name.

(7) A charge relating to movable or immovable property whereof any body corporate has by law the management, control or custody, may describe the property in question as being under the lawful management or control or in the lawful custody of the body corporate in question.

(8) If it is uncertain to which of two or more persons property in connection with which an offence has been committed belonged at the time when the offence was committed, the relevant charge may describe the property as the property of one or other of those persons, naming each of them but without specifying which of them, and it shall be sufficient at the trial to prove that at the time when the offence was committed the property belonged to one or other of those persons without proving which of them.

(9) If property alleged to have been stolen was not in the physical possession of the owner thereof at the time when the theft was committed but in the physical possession of another person who had the custody thereof on behalf of the owner, it shall be sufficient to allege in a charge for the theft of that property that it was in the lawful custody or under the lawful control of that other person.

(10) A charge relating to theft from any grave need not allege that anything in the grave is the property of any person.

(11) In a charge in which any trade mark or forged trade mark is proposed to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that such trade mark or forged trade mark is a trade mark or forged trade mark.

(12) A charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under the common law or any statute, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence to the prosecutor unknown.

96. Naming of company, firm or partnership in charge.—A reference in a charge to a company, firm or partnership shall be sufficient if the reference is to the name of the company, firm or partnership.

97. Naming of joint owners of property in charge.—A reference in a charge to joint owners of property shall be sufficient if the reference is to one specific owner and another owner or, as the case may be, other owners.

98. Charge of murder or culpable homicide sufficient if it alleges fact of killing.—It shall be sufficient in a charge of murder to allege that the accused unlawfully and intentionally killed the deceased, and it shall be sufficient in a charge of culpable homicide to allege that the accused unlawfully killed the deceased.

99. Charge relating to document sufficient if it refers to document by name.—(1) In any charge relating to the forging, uttering, stealing, destroying or concealing of, or to some other unlawful dealing with any document, it shall be sufficient to describe the document by any name or designation by which it is usually known or by the purport thereof, without setting out any copy or facsimile thereof or otherwise describing it or stating its value.

(2) Whenever it is necessary in any case not referred to in subsection (1) to make any allegation in any charge in relation to any document, whether it consists wholly or in part of writing, print or figures, it shall be sufficient to describe the document by any name or designation by which it is usually known or by the purport thereof, without setting out any copy or facsimile of the whole or any part thereof, unless the wording of the document is an element of the offence.

100. Charge alleging theft may allege general deficiency.—On a charge alleging the theft of money or property by a person entrusted with the control thereof, the charge may allege a general deficiency in a stated amount, notwithstanding that such general deficiency is made up of specific sums of money or articles or of a sum of money representing the value of specific articles, the theft of which extended over a period.

101. Charge relating to false evidence.—(1) A charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement or the procuring of false evidence or a false statement—

- (a) need not set forth the words of the oath or the affirmation or the evidence or the statement, if it sets forth so much of the purport thereof as is material;
- (b) need not allege, nor need it be established at the trial, that the false evidence or statement was material to any issue at the relevant proceedings or that it was to the prejudice of any person.

(2) A charge relating to the giving or the procuring or attempted procuring of false evidence need not allege the jurisdiction or state the nature of the authority of the court or tribunal before which or the officer before whom the false evidence was given or was intended or proposed to be given.

102. Charge relating to insolvency.—A charge relating to insolvency need not set forth any debt, act of insolvency or adjudication or any other proceeding in any court, or any order made or any warrant or document issued by or under the authority of any court.

103. Charge alleging intent to defraud need not allege or prove such intent in respect of particular person or mention owner of property or set forth details of deceit.—In any charge in which it is necessary to allege that the accused performed an act with an intent to defraud, it shall be sufficient to allege and to prove that the accused performed the act with intent to defraud without alleging and proving that it was the intention of the accused to defraud any particular person, and such a charge need not mention the owner of any property involved or set forth the details of any deceit.

104. Reference in charge to objectionable matter not necessary.—A charge of printing, publishing, manufacturing, making or producing blasphemous, seditious, obscene or defamatory matter, or of distributing, displaying, exhibiting, selling or offering or keeping for sale any obscene book, pamphlet, newspaper or other printed or written matter, shall not be open to objection or be deemed insufficient on the ground that it does not set out the words thereof: Provided that the court may order that particulars shall be furnished by the prosecution stating what passages in such book, pamphlet, newspaper, printing or writing are relied upon in support of the charge.

CHAPTER 15 THE PLEA

105. Accused to plead to charge.—The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.

[S. 105 substituted by s. 1 of Act No. 62 of 2001.]

Wording of Sections

105A. Plea and sentence agreements.—(1) (a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of—

- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
 - (ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty—
 - (aa) a just sentence to be imposed by the court; or
 - (bb) the postponement of the passing of sentence in terms of section 297 (1) (a); or
 - (cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297 (1) (b); and
 - (dd) if applicable, an award for compensation as contemplated in section 300.
- (b) The prosecutor may enter into an agreement contemplated in paragraph (a)—
- (i) after consultation with the person charged with the investigation of the case;
 - (ii) with due regard to, at least, the—

- (aa) nature of and circumstances relating to the offence;
 - (bb) personal circumstances of the accused;
 - (cc) previous convictions of the accused, if any; and
 - (dd) interests of the community, and
- (iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding—
- (aa) the contents of the agreement; and
 - (bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.
- (c) The requirements of paragraph (b) (i) may be dispensed with if the prosecutor is satisfied that consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could—
- (i) cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative; and
 - (ii) affect the administration of justice adversely.
- (2) An agreement contemplated in subsection (1) shall be in writing and shall at least—
- (a) state that the accused, before entering into the agreement, has been informed that he or she has the right—
 - (i) to be presumed innocent until proved guilty beyond reasonable doubt;
 - (ii) to remain silent and not to testify during the proceedings; and
 - (iii) not to be compelled to give self-incriminating evidence;
 - (b) state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused;
 - (c) be signed by the prosecutor, the accused and his or her legal representative; and
 - (d) if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement.
- (3) The court shall not participate in the negotiations contemplated in subsection (1).
- (4) (a) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then—
- (i) require the accused to confirm that such an agreement has been entered into; and
 - (ii) satisfy itself that the requirements of subsection (1) (b) (i) and (iii) have been complied with.
- (b) If the court is not satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall—
- (i) inform the prosecutor and the accused of the reasons for noncompliance; and
 - (ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.

(5) If the court is satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court.

(6) (a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether—

- (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
- (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and
- (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.

(b) After an inquiry has been conducted in terms of paragraph (a), the court shall, if—

- (i) the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into; or
- (ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or
- (iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand,

record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor.

(c) If the court has recorded a plea of not guilty, the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(7) (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.

(b) For purposes of paragraph (a), the court—

- (i) may—
 - (aa) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and
 - (bb) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; and
- (ii) must, if the offence concerned is an offence—
 - (aa) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997); or
 - (bb) for which a minimum penalty is prescribed in the law creating the offence,have due regard to the provisions of that Act or law.

(8) If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.

(9) (a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.

(b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may—

- (i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or
- (ii) withdraw from the agreement.

(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b) (i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.

(d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b) (ii), the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(10) Where a trial starts *de novo* as contemplated in subsection (6) (c) or (9) (d)—

- (a) the agreement shall be null and void and no regard shall be had or reference made to—
 - (i) any negotiations which preceded the entering into the agreement;
 - (ii) the agreement; or
 - (iii) any record of the agreement in any proceedings relating thereto, unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admission so recorded shall stand as proof of such admission;
- (b) the prosecutor and the accused may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts; and
- (c) the prosecutor may proceed on any charge.

(11) (a) The National Director of Public Prosecutions, in consultation with the Minister, shall issue directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this section and any directive so issued shall be observed in the application of this section.

(b) The directives contemplated in paragraph (a)—

- (i) must prescribe the procedures to be followed in the application of this section relating to—
 - (aa) any offence referred to in the Schedule to the Criminal Law Amendment Act, 1997, or any other offence for which a minimum penalty is prescribed in the law creating the offence;
 - (bb) any offence in respect of which a court has the power or is required to conduct a specific enquiry, whether before or after convicting or sentencing the accused; and
 - (cc) any offence in respect of which a court has the power or is required to make a specific order upon conviction of the accused;
- (ii) may prescribe the procedures to be followed in the application of this section relating to any other offence in respect of which the National Director of Public Prosecutions deems it necessary or expedient to prescribe specific procedures;
- (iii) must ensure that adequate disciplinary steps shall be taken against a prosecutor who fails to comply with any directive; and

- (iv) must ensure that comprehensive records and statistics relating to the implementation and application of this section are kept by the prosecuting authority.

(c) The National Director of Public Prosecutions shall submit directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this section.

(d) Any directive issued under this subsection may be amended or withdrawn in like manner.

(12) The National Director of Public Prosecutions shall at least once every year submit the records and statistics referred to in subsection (11) (b) (iv) to Parliament.

(13) In this section “sentence agreement” means an agreement contemplated in subsection (1) (a) (ii).

[S. 105A inserted by s. 2 of Act No. 62 of 2001.]

106. Pleas.—(1) When an accused pleads to a charge he may plead—

- (a) that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or
- (b) that he is not guilty; or
- (c) that he has already been convicted of the offence with which he is charged; or
- (d) that he has already been acquitted of the offence with which he is charged; or
- (e) that he has received a free pardon under section 327 (6) from the State President for the offence charged; or
- (f) that the court has no jurisdiction to try the offence; or
- (g) that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or
- (h) that the prosecutor has no title to prosecute; or
- (i) that the prosecution may not be resumed or instituted owing to an order by a court under section 342A (3) (c).

[Para. (i) added by s. 4 of Act No. 86 of 1996.]

(2) Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.

107. Truth and publication for public benefit of defamatory matter to be specially pleaded.—A person charged with the unlawful publication of defamatory matter, who sets up as a defence that the defamatory matter is true and that it was for the public benefit that the matter should

be published, shall plead such defence specially, and may plead it with any other plea except the plea of guilty.

108. Issues raised by plea to be tried.—If an accused pleads a plea other than a plea of guilty, he shall, subject to the provisions of sections 115, 122 and 141 (3), by such plea be deemed to demand that the issues raised by the plea be tried.

109. Accused refusing to plead.—Where an accused in criminal proceedings refuses to plead to any charge, the court shall record a plea of not guilty on behalf of the accused and a plea so recorded shall have the same effect as if it had been actually pleaded.

CHAPTER 16 JURISDICTION

110. Accused brought before court which has no jurisdiction.—(1) Where an accused does not plead that the court has no jurisdiction and it at any stage—

- (a) after the accused has pleaded a plea of guilty or of not guilty; or
- (b) where the accused has pleaded any other plea and the court has determined such plea against the accused,

appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.

(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.

111. Minister may remove trial to jurisdiction of another attorney-general.—(1) (a) The direction of the National Director of Public Prosecutions contemplated in section 179 (1) (a) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.

(b) A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection (3) be handed in at the court in which the proceedings are to commence.

(2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.

(3) Where the National Director issues a direction contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall—

- (a) cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the Director in whose area of jurisdiction the said criminal proceedings shall commence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned;
- (b) forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.

[S. 111 amended by s. 6 of Act No. 26 of 1987, by s. 68 of Act No. 88 of 1996 and by s. 44 of Act No. 32 of 1998.]

Wording of Sections

CHAPTER 17 PLEA OF GUILTY AT SUMMARY TRIAL

112. Plea of guilty.—(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea—

- (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and—
 - (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*; or
 - (ii) deal with the accused otherwise in accordance with law;

[Para. (a) substituted by s. 4 (a) of Act No. 109 of 1984, by s. 7 of Act No. 5 of 1991 and by s. 2 of Act No. 33 of 1997.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

- (b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

[Para. (b) amended by s. 4 (b) of Act No. 109 of 1984 and substituted by s. 7 of Act No. 5 of 1991 and by s. 2 of Act No. 33 of 1997.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of

the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

113. Correction of plea of guilty.—(1) If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

[Sub-s. (1) amended by s. 5 of Act No. 86 of 1996.]

Wording of Sections

(2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.

[Sub-s. (2) added by s. 8 of Act No. 5 of 1991.]

114. Committal by magistrate's court of accused for sentence by regional court after plea of guilty.—(1) If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion—

- (a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;
- (b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or
- (c) that the accused is a person referred to in section 286A (1),

[Para. (c) added by s. 18 (b) of Act No. 116 of 1993.]

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.

(2) Where an accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(3) (a) Unless the regional court concerned—

- (i) is satisfied that a plea of guilty or an admission by the accused which is material to his guilt was incorrectly recorded; or
- (ii) is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for sentence,

the court shall make a formal finding of guilty and sentence the accused.

(b) If the court is satisfied that a plea of guilty or any admission by the accused which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for

sentence or that he has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(4) The provisions of section 112 (3) shall apply with reference to the proceedings under this section.

CHAPTER 18 PLEA OF NOT GUILTY AT SUMMARY TRIAL

115. Plea of not guilty and procedure with regard to issues.—(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.

(2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

(3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not.

115A. Committal of accused for trial by regional court.—(1) Where an accused pleads not guilty in a magistrate's court, the court shall, subject to the provisions of section 115, at the request of the prosecutor made before any evidence is tendered, refer the accused for trial to a regional court having jurisdiction.

(2) The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court.

[S. 115A inserted by s. 4 of Act No. 56 of 1979.]

116. Committal of accused for sentence by regional court after trial in magistrate's court.—(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion—

- (a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;
- (b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or
- (c) that the accused is a person referred to in section 286A (1),

[Para. (c) added by s. 19 (b) of Act No. 116 of 1993.]

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.

(2) The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court.

(3) (a) The regional court shall, after considering the record of the proceedings in the magistrate's court, sentence the accused, and the judgment of the magistrate's court shall stand for this purpose and be sufficient for the regional court to pass any competent sentence: Provided that if the regional magistrate is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she may request the presiding officer in the magistrate's court to provide him or her with the reasons for the conviction and if, after considering such reasons, the regional magistrate is satisfied that the proceedings are in accordance with justice he or she may sentence the accused, but if he or she remains of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit such reasons and the reasons of the presiding officer of the magistrate's court, together with the record of the proceedings in the magistrate's court, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as possible, lay the same in chambers before a judge who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him or her under section 303.

[Para. (a) amended by s. 6 of Act No. 86 of 1996.]

Wording of Sections

(b) If a regional magistrate acts under the proviso to paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings, and, if the accused is in custody, the regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.

117. Committal to superior court in special case.—Where an accused in a lower court pleads not guilty to the offence charged against him and a ground of his defence is the alleged invalidity of a provincial ordinance or a proclamation of the State President on which the charge against him is founded and upon the validity of which a magistrate's court is in terms of section 110 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), not competent to pronounce, the accused shall be committed for a summary trial before a superior court having jurisdiction.

[S. 117 amended by s. 1 of Act No. 49 of 1996.]

Wording of Sections

118. Non-availability of judicial officer after plea of not guilty.—If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.

CHAPTER 19

PLEA IN MAGISTRATE'S COURT ON CHARGE JUSTICIABLE IN SUPERIOR COURT

119. Accused to plead in magistrate's court on instructions of attorney-general.—When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the attorney-general, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court, and the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.

[S. 119 substituted by s. 5 of Act No. 56 of 1979, by s. 3 of Act No. 64 of 1982, and by s. 16 of Act No. 59 of 1983.]

Wording of Sections

120. Charge-sheet and proof of record.—The proceedings shall be commenced by the lodging of a charge-sheet with the clerk of the court in question and the provisions of subsections (2) and (3) of section 76 shall *mutatis mutandis* apply with reference to the charge-sheet and the record of the proceedings.

121. Plea of guilty.—(1) Where an accused under section 119 pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph (b) of section 112 (1).

(2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he shall stop the proceedings.

(b) If the magistrate is not satisfied as provided in paragraph (a), he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122 (1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(3) If the magistrate is satisfied as provided in subsection (2) (a), he shall adjourn the proceedings pending the decision of the attorney-general, who may—

- (a) arraign the accused for sentence before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2) (a);
- (b) decline to arraign the accused for sentence before any court but arraign him for trial on any charge at a summary trial before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were stopped under subsection (2) (a);
- (c) institute a preparatory examination against the accused.

[Sub-s. (3) substituted by s. 6 of Act No. 56 of 1979.]

Wording of Sections

(4) The magistrate or any other magistrate of the magistrate's court concerned shall advise the accused of the decision of the attorney-general and, if the decision is that the accused be arraigned for sentence—

- (a) in the magistrate's court concerned, dispose of the case on the charge on which the accused is arraigned; or
- (b) in a regional court or superior court, adjourn the case for sentence by the regional court or superior court concerned.

(5) (a) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for sentence, be received as part of the record of that court against the accused or, if the accused is arraigned in the magistrate's court in which the proceedings were stopped under subsection (2) (a), the record of such proceedings shall stand as the record of that court, and the plea of guilty and any admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(aA) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that

court against the accused, and any admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such admission was incorrectly recorded.

[Para. (aA) inserted by s. 17 of Act No. 59 of 1983.]

(b) Unless the accused satisfies the court that a plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty of the offence to which he has pleaded guilty and impose any competent sentence.

[Para. (b) amended by s. 29 of Act No. 105 of 1997.]

Wording of Sections

(6) If the accused satisfies the court that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(7) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

122. Plea of not guilty.—(1) Where an accused under section 119 pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall stop the proceedings and adjourn the case pending the decision of the attorney-general.

(2) Where the proceedings have been adjourned under subsection (1), the attorney-general may—

- (i) arraign the accused on any charge at a summary trial before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were adjourned under subsection (1); or
- (ii) institute a preparatory examination against the accused,

and the attorney-general shall advise the magistrate's court concerned of his decision.

(3) The magistrate, who need not be the magistrate before whom the proceedings under section 119 or 122 (1) were conducted, shall advise the accused of the decision of the attorney-general, and if the decision is that the accused be arraigned—

- (a) in the magistrate's court concerned, require the accused to plead to that charge, and, if the plea to that charge is one of guilty or the plea in respect of an offence of which the accused may on such charge be convicted is one of guilty and the prosecutor accepts such plea, deal with the matter in accordance with the provisions of section 112, in which event the provisions of section 114 (1) shall not apply, or, if the plea is one of not guilty, deal with the matter in accordance with the provisions of section 115 and proceed with the trial;

[Para. (a) substituted by s. 16 of Act No. 139 of 1992.]

Wording of Sections

- (b) in a regional court or a superior court, commit the accused for a summary trial before the court concerned.

(4) The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such an admission.

CHAPTER 19A
PLEA IN MAGISTRATE'S COURT ON CHARGE TO BE ADJUDICATED IN REGIONAL
COURT

[Chapter 19A inserted by s. 7 of Act No. 56 of 1979.]

[Heading inserted by s. 7 of Act No. 56 of 1979.]

122A. Accused to plead in magistrate's court on charge to be tried in regional court.—When an accused appears in a magistrate's court and the alleged offence may be tried by a regional court but not by a magistrate's court or the prosecutor informs the court that he is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of a regional court, the prosecutor may, notwithstanding the provisions of section 75, put the relevant charge, as well as any other charge which shall, in terms of section 82, be disposed of by a regional court, to the accused, who shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.

[S. 122A inserted by s. 7 of Act No. 56 of 1979 and substituted by s. 18 of Act No. 59 of 1983.]

Wording of Sections

122B. Charge-sheet and proof of record.—The provisions of section 120 shall *mutatis mutandis* apply with reference to the proceedings under section 122A and the record of the proceedings.

[S. 122B inserted by s. 7 of Act No. 56 of 1979.]

122C. Plea of guilty.—(1) Where an accused under section 122A pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph (b) of section 112 (1).

(2) (a) If the magistrate is satisfied that the accused admits the allegations stated in the charge, he shall adjourn the case for sentence by the regional court concerned.

(b) If the magistrate is not satisfied as provided in paragraph (a), he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122D (1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(3) (a) The record of the proceedings in the magistrate's court shall, upon proof thereof in the regional court in which the accused is arraigned for sentence, be received as part of the record of that court against the accused, and the plea of guilty and any admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty of the offence to which he has pleaded guilty, and impose any competent sentence.

(4) If the accused satisfies the court that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(5) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purpose of determining an appropriate sentence.

[S. 122C inserted by s. 7 of Act No. 56 of 1979.]

122D. Plea of not guilty.—(1) Where an accused under section 122A pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall commit the accused for a summary trial in the regional court concerned on the charge to which he has pleaded not guilty or on the charge in respect of which a plea of not guilty has been entered under section 122C (2) (b).

(2) The regional court may try the accused on the charge in respect of which he has been committed for a summary trial under subsection (1) or on any other or further charge which the prosecutor may prefer against the accused and which the court is competent to try.

(3) The record of proceedings in the magistrate's court shall, upon proof thereof in the regional court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such an admission.

[S.122D inserted by s.7 of Act No. 56 of 1979.]

CHAPTER 20 PREPARATORY EXAMINATION

123. Attorney-general may instruct that preparatory examination be held.—If an attorney-general is of the opinion that it is necessary for the more effective administration of justice—

- (a) that a trial in a superior court be preceded by a preparatory examination in a magistrate's court into the allegations against the accused, he may, where he does not follow the procedure under section 119, or, where he does follow it and the proceedings are adjourned under section 121 (3) or 122 (1) pending the decision of the attorney-general, instruct that a preparatory examination be instituted against the accused;

[Para. (a) amended by s.8 of Act No. 56 of 1979.]

Wording of Sections

- (b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into a preparatory examination.

124. Proceedings preceding holding of preparatory examination to form part of preparatory examination record.—Where an attorney-general acts under paragraph (a) or (b) of section 123—

- (a) the record of any proceedings under section 121 (1) or 122 (1) or of any proceedings in the magistrate's court or regional court before the trial was converted into a preparatory examination, shall form part of the preparatory examination record;

[Para. (a) amended by s.9 of Act No. 56 of 1979.]

Wording of Sections

- (b) and the accused has pleaded to a charge, the preparatory examination shall continue on the charge to which the accused has pleaded: Provided that where evidence is led at such preparatory examination which relates to an offence, other than the offence contained in the charge to which the accused has pleaded, allegedly committed by the accused, such evidence shall not be excluded on the ground only that the evidence does not relate to the offence to which the accused has pleaded guilty.

125. Attorney-general may direct that preparatory examination be conducted at a specified place.—(1) Where an attorney-general instructs that a preparatory examination be instituted or that a trial be converted into a preparatory examination, he may, if it appears to him expedient on account of the number of accused involved or of excessive inconvenience or of possible disturbance of the public order, that the preparatory examination be held within his area of jurisdiction in a court other than the court in which the relevant proceedings were commenced, direct that the preparatory examination be instituted in such court or, where a trial has been converted into a preparatory examination, be continued in such other court.

(2) The magistrate or regional magistrate shall, after advice of the decision of the attorney-general, advise the accused of the decision of the attorney-general and adjourn the proceedings of such other court, and thereafter forward a copy of the record of the proceedings, certified as correct by the clerk of the court, to the court to which the proceedings have been adjourned.

(3) The court to which the proceedings are adjourned under subsection (2), shall receive the copy of the record referred to in that subsection, which shall then form part of the proceedings of that court, and shall proceed to conduct the preparatory examination as if it were a preparatory examination instituted in that court.

126. Procedure to be followed by magistrate at preparatory examination.—Where an attorney-general instructs that a preparatory examination be held against an accused, the magistrate or regional magistrate shall, after advice of the decision of the attorney-general, advise the accused of the decision of the attorney-general and proceed in the manner hereinafter described to enquire into the charge against the accused.

127. Recalling of witnesses after conversion of trial into preparatory examination.—Where an attorney-general instructs that a trial be converted into a preparatory examination, it shall not be necessary for the magistrate or regional magistrate to recall any witness who has already given evidence at the trial, but the record of the evidence thus given, certified as correct by the magistrate or regional magistrate, as the case may be, or, if such evidence was recorded in shorthand or by mechanical means, any document purporting to be the transcription of the original record of such evidence and purporting to be certified as correct under the hand of the person who transcribed it, shall have the same legal force and effect and shall be admissible in evidence in the same circumstances as the evidence given in the course of a preparatory examination: Provided that if it appears to the magistrate or regional magistrate concerned that it may be in the interests of justice to have a witness already examined recalled for further examination, then such witness shall be recalled and further examined and the evidence given by him shall be recorded in the same manner as other evidence given at a preparatory examination.

128. Examination of prosecution witnesses at preparatory examination.—The prosecutor may, at a preparatory examination, call any witness in support of the charge to which the accused has pleaded or to testify in relation to any other offence allegedly committed by the accused.

129. Recording of evidence at preparatory examination and proof of record.—(1) The evidence given at a preparatory examination shall be recorded, and if such evidence is recorded in shorthand or by mechanical means, a document purporting to be a transcription of the original record of such evidence and purporting to be certified as correct under the hand of the person who transcribed such evidence, shall have the same legal force and effect as such original record.

(2) The record of a preparatory examination may be proved in a court by the mere production thereof or of a copy thereof in terms of section 235.

130. Charge to be put at conclusion of evidence for prosecution.—The prosecutor shall, at the conclusion of the evidence in support of the charge, put to the accused such charge or charges as may arise from the evidence and which the prosecutor may prefer against the accused.

131. Accused to plead to charge.—The magistrate or regional magistrate, as the case may be, shall, subject to the provisions of sections 77 and 85, require an accused to whom a charge is put under section 130 forthwith to plead to the charge.

132. Procedure after plea.—(1) (a) Where an accused who has been required under section 131 to plead to a charge to which he has not pleaded before, pleads guilty to the offence charged, the presiding judicial officer shall question him in accordance with the provisions of paragraph (b) of section 112 (1).

(b) If the presiding judicial officer is not satisfied that the accused admits all the allegations in the charge, he shall record in what respect he is not so satisfied and enter a plea of not guilty: Provided that an allegation with reference to which the said judicial officer is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(2) Where an accused who has been required under section 131 to plead to a charge to which he has not pleaded before, pleads not guilty to the offence charged, the presiding judicial officer shall act in accordance with the provisions of section 115.

133. Accused may testify at preparatory examination.—An accused may, after the provisions of section 132 have been complied with but subject to the provisions of section 151 (1) (b) which shall *mutatis mutandis* apply, give evidence or make an unsworn statement in relation to a charge put to him under section 130, and the record of such evidence or statement shall be received in evidence before any court in criminal proceedings against the accused upon its mere production without further proof.

134. Accused may call witnesses at preparatory examination.—An accused may call any competent witness on behalf of the defence.

135. Discharge of accused at conclusion of preparatory examination.—As soon as a preparatory examination is concluded and the magistrate or regional magistrate, as the case may be, is upon the whole of the evidence of the opinion that no sufficient case has been made out to put the accused on trial upon any charge put to the accused under section 130 or upon any charge in respect of an offence of which the accused may on such charge be convinced, he may discharge the accused in respect of such charge.

136. Procedure with regard to exhibits at preparatory examination.—The magistrate or regional magistrate, as the case may be, shall cause every document and every article produced or identified as an exhibit by any witness at a preparatory examination to be inventoried and labelled or otherwise marked, and shall cause such documents and articles to be kept in safe custody pending any trial following upon such preparatory examination.

137. Magistrate to transmit record of preparatory examination to attorney-general.—The magistrate or regional magistrate, as the case may be, shall, at the conclusion of a preparatory examination and whether or not the accused is under section 135 discharged in respect of any charge, send a copy of the record of the preparatory examination to the attorney-general and, where the accused is not discharged in respect of all the charges put to him under section 130, adjourn the proceedings pending the decision of the attorney-general.

138. Preparatory examination may be continued before different judicial officer.—A preparatory examination may at any stage be continued by a judicial officer other than the judicial officer before whom the proceedings were commenced, and, if necessary, again be continued by the judicial officer before whom the proceedings were commenced.

139. Attorney-general may arraign accused for sentence or trial.—After considering the record of a preparatory examination transmitted to him under section 137, the attorney-general may—

- (a) in respect of any charge to which the accused has under section 131 pleaded guilty, arraign the accused for sentence before any court having jurisdiction;
- (b) arraign the accused for trial before any court having jurisdiction, whether the accused has under section 131 pleaded guilty or not guilty to any charge and whether or not he has been discharged under section 135;
- (c) decline to prosecute the accused,

and the attorney-general shall advise the lower court concerned of his decision.

140. Procedure where accused arraigned for sentence.—(1) Where an accused is under section 139 (a) arraigned for sentence, any magistrate or regional magistrate of the court in which the preparatory examination was held shall advise the accused of the decision of the attorney-general and, if the decision is that the accused be arraigned—

- (a) in the court concerned, dispose of the case on the charge on which the accused is arraigned; or
- (b) in a court other than the court concerned, adjourn the case for sentence by such other court.

(2) (a) The record of the preparatory examination shall, upon proof thereof in the court in which the accused is arraigned for sentence, be received as part of the record of that court against the accused or, if the accused is arraigned in the court in which the preparatory examination was held, the record of the preparatory examination shall stand as the record of that court, and the plea of guilty and any admission by the accused shall stand and form part of the record of that court unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty of the offence to which he has pleaded guilty and impose any competent sentence.

Wording of Sections

(3) If the accused satisfies the court that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(4) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

141. Procedure where accused arraigned for trial.—(1) Where an accused is under section 139 (b) arraigned for trial, a magistrate or regional magistrate of the court in which the preparatory examination was held shall advise the accused of the decision of the attorney-general and, if the accused is to be arraigned in a court other than the court concerned, commit the accused for trial by such other court.

(2) Where an accused is arraigned for trial after a preparatory examination, the case shall be dealt with in all respects as with a summary trial.

(3) The record of the preparatory examination shall, upon proof thereof in the court in which the accused is arraigned for trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such admission: Provided that the evidence adduced at such preparatory examination shall not form part of the record of the trial of the accused unless—

- (a) the accused pleads guilty at his trial to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea; or
- (b) the parties to the proceedings agree that any part of such evidence be admitted at the proceedings.

(4) (a) Where an accused who has been discharged under section 135 is arraigned for trial under section 139 (b), the clerk of the court where the preparatory examination was held shall issue to him a written notice to that effect and stating the place, date and time for the appearance of the accused in that court for committal for trial, or, if he is to be arraigned in that court, to plead to the charge on which he is to be arraigned.

(b) The notice referred to in paragraph (a) shall be served on the accused in the manner provided for in sections 54 (2) and (3) for the service of a summons in a lower court and the provisions of sections 55 (1) and (2) shall *mutatis mutandis* apply with reference to such a notice.

(c) If the accused is committed for trial by another court, the court committing the accused may direct that he be detained in custody, whereupon the provisions of Chapter 9 shall apply with reference to the release of the accused on bail.

142. Procedure where attorney-general declines to prosecute.—Where an attorney-general under section 139 (c) declines to prosecute an accused, he shall advise the magistrate of the district in which the preparatory examination was held of his decision, and such magistrate shall forthwith have the accused released from custody or, if the accused is not in custody, advise the accused in writing of the decision of the attorney-general, whereupon no criminal proceedings shall again be instituted against the accused in respect of the charge in question.

143. Accused may inspect preparatory examination record and is entitled to copy thereof.—(1) An accused who is arraigned for sentence or for trial under section 139 may, without payment, inspect the record of the preparatory examination at the time of his arraignment before the court.

(2) (a) An accused who is arraigned for sentence or for trial under section 139 shall be entitled to a copy of the record of the preparatory examination upon payment, except where a legal practitioner under the Legal Aid Act, 1969 (Act 22 of 1969), or *pro Deo* counsel is appointed to defend the accused or where the accused is not legally represented, of a reasonable amount not exceeding twenty-five cents for each folio of seventy-two words or part thereof.

(b) The clerk of the court shall as soon as possible provide the accused or his legal advisor with a copy of the preparatory examination record in accordance with the provisions of paragraph (a).

CHAPTER 21 TRIAL BEFORE SUPERIOR COURT

144. Charge in superior court to be laid in an indictment.—(1) Where an attorney-general arraigns an accused for sentence or trial by a superior court, the charge shall be contained in a document called an indictment, which shall be framed in the name of the attorney-general.

[Sub-s. (1) substituted by s. 10 (a) of Act No. 56 of 1979.]

Wording of Sections

(2) The indictment shall, in addition to the charge against the accused, include the name and, where known and where applicable, the address and a description of the accused with regard to sex, nationality and age.

[Sub-s. (2) substituted by s. 17 of Act No. 139 of 1992.]

Wording of Sections

(3) (a) Where an attorney-general under section 75, 121 (3) (b) or 122 (2) (i) arraigns an accused for a summary trial in a superior court, the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the attorney-general, are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice or the security of the State, as well as a list of the names and addresses of the witnesses the attorney-general intends calling at the summary trial on behalf of the State: Provided that—

- (i) this provision shall not be so construed that the State shall be bound by the contents of the summary;
- (ii) the attorney-general may withhold the name and address of a witness if he is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld;
- (iii) the omission of the name or address of a witness from such list shall in no way affect the validity of the trial.

[Para. (a) amended by s. 10 (b) of Act No. 56 of 1979.]

Wording of Sections

(b) Where the evidence for the State at the trial of the accused differs in a material respect from the summary referred to in paragraph (a), the trial court may, at the request of the accused and if it appears to the court that the accused might be prejudiced in his defence by reason of such difference, adjourn the trial for such period as to the court may seem adequate.

(4) (a) An indictment, together with a notice of trial referred to in the rules of court, shall, unless an accused agrees to a shorter period, be served on an accused at least ten days (Sundays and public holidays excluded) before the date appointed for the trial—

- (i) in accordance with the procedure and manner laid down by the rules of court, by handing it to him personally, or, if he cannot be found, by delivering it at his place of residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there, or, if he has been released on bail, by leaving it at the place determined under section 62 for the service of any document on him; or
- (ii) by the magistrate or regional magistrate committing him to the superior court, by handing it to him.

(b) A return of the mode of service by the person who served the indictment and the notice of trial, or, if the said documents were served in court on the accused by a magistrate or regional magistrate, an endorsement to that effect on the record of proceedings, may, upon the failure of the accused to attend the proceedings in the superior court, be handed in at the proceedings and shall be *prima facie* proof of the service.

(c) The provisions of section 55 (1) and (2) shall *mutatis mutandis* apply with reference to a notice of trial served on an accused in terms of this subsection.

145. Trial in superior court by judge sitting with or without assessors.—(1) (a) Except as provided in section 148, an accused arraigned before a superior court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.

(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.

(2) Where an attorney-general arraigns an accused before a superior court—

- (a) for trial and the accused pleads not guilty; or
- (b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge,

the presiding judge may summon not more than two assessors to assist him at the trial.

[Sub-s. (2) amended by s. 2 of Act No. 107 of 1990 and by s. 31 of Act No. 105 of 1997.]

Wording of Sections

(3) No assessor shall hear any evidence unless he first takes an oath or, as the case may be, makes an affirmation, administered by the presiding judge, that he will, on the evidence placed before him, give a true verdict upon the issues to be tried.

(4) An assessor who takes an oath or makes an affirmation under subsection (3) shall be a member of the court: Provided that—

- (a) subject to the provisions of paragraphs (b) and (c) of this proviso and of section 217 (3) (b), the decision or finding of the majority of the members of the court upon any question of fact or upon the question referred to in the said paragraph (b) shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court;
- (b) if the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him do not take part in any decision upon the question whether evidence of any confession or other

statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he may for this purpose sit alone;

- (c) the presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he may for this purpose sit alone.

[Sub-s. (4) substituted by s. 4 of Act No. 64 of 1982.]

Wording of Sections

(5) If an assessor is not in the full-time employment of the State, he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor.

146. Reasons for decision by superior court in criminal trial.—A judge presiding at a criminal trial in a superior court shall—

- (a) where he decides any question of law, including any question under paragraph (c) of the proviso to section 145 (4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision;
- (b) whether he sits with or without assessors, give the reasons for the decision or finding of the court upon any question of fact;
- (c) where he sits with assessors, give the reasons for the decision or finding of the court upon the question referred to in paragraph (b) of the proviso to section 145 (4);
- (d) where he sits with assessors and there is a difference of opinion upon any question of fact or upon the question referred to in paragraph (b) of the proviso to section 145 (4), give the reasons for the decision or finding of the member of the court who is in the minority or, where the presiding judge sits with only one assessor, of such an assessor.

[S. 146 substituted by s. 5 of Act No. 64 of 1982.]

Wording of Sections

147. Death or incapacity of assessor.—(1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct—

- (a) that the trial proceed before the remaining member or members of the court; or
- (b) that the trial start *de novo*, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor.

(2) Where the presiding judge acts under subsection (1) (b), the plea already recorded shall stand.

148.

[S. 148 repealed by s. 10 of Act No. 62 of 2000.]

Wording of Sections

149. Change of venue in superior court after indictment has been lodged.—(1) A superior court may, at any time after an indictment has been lodged with the registrar of that court and before the date of trial, upon application by the prosecution and after notice to the accused, or upon application by the accused after notice to the prosecution, order that the trial be held at a place within the area of jurisdiction of such court, other than the place determined for the trial, and that it be held on a date and at a time, other than the date and time determined for the trial.

(2) If the accused is not present or represented at such an application by the prosecution or if the prosecution is not represented at such an application by the accused, the court shall direct that a copy of the order be served on the accused or, as the case may be, on the prosecution, and upon service thereof, the venue and date and time as changed shall be deemed to be the venue and date and time respectively that were originally appointed for the trial.

CHAPTER 22 CONDUCT OF PROCEEDINGS

150. Prosecutor may address court and adduce evidence.—(1) The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he intends adducing in support of the charge.

(2) (a) The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or that he committed an offence of which he may be convicted on the charge.

(b) Where any document may be received in evidence before any court upon its mere production, the prosecutor shall read out such document in court unless the accused is in possession of a copy of such document or dispenses with the reading out thereof.

151. Accused may address court and adduce evidence.—(1) (a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence on behalf of the defence, and if he answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence, and—

- (i) if the accused answers in the affirmative, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or
- (ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

(2) (a) The accused may then examine any other witness for the defence and adduce such other evidence on behalf of the defence as may be admissible.

(b) Where any document may be received in evidence before any court upon its mere production and the accused wishes to place such evidence before the court, he shall read out the relevant document in court unless the prosecutor is in possession of a copy of such document or dispenses with the reading out thereof.

152. Criminal proceedings to be conducted in open court.—Except where otherwise expressly provided by this Act or any other law, criminal proceedings in any court shall take place in open court, and may take place on any day.

153. Circumstances in which criminal proceedings shall not take place in open court.—(1) If it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the

public or any class thereof shall not be present at such proceedings or any part thereof.

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct—

- (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;
- (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit—

- (a) any indecent act towards or in connection with any other person;
- (b) any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; or
- (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person *in loco parentis*, requests otherwise.

[Sub-s. (3A) inserted by s. 2 of Act No. 103 of 1987.]

(4) Where an accused at criminal proceedings before any court is under the age of eighteen years, no person, other than such accused, his legal representative and parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his presence is authorized by the court.

154. Prohibition of publication of certain information relating to criminal proceedings.—(1) Where a court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever: Provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him, the plea, the verdict and the sentence, unless the court is of the

opinion that the publication of any part of such information might defeat the object of its direction under section 153 (1), in which event the court may direct that such part shall not be published.

(2) (a) Where a court under section 153 (3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153 (3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he is of the opinion that such publication would be just and equitable.

[Para. (a) substituted by s. 3 of Act No. 103 of 1987.]

Wording of Sections

(b) No person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153 (3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question.

(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.

(4) No prohibition or direction under this section shall apply with reference to the publication in the form of a *bona fide* law report of—

- (a) information for the purpose of reporting any question of law relating to the proceedings in question; or
- (b) any decision or ruling given by any court on such question,

if such report does not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and does not mention the place where the offence in question was alleged to have been committed.

(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153 (2), shall be guilty of an offence and liable on conviction to a fine not exceeding R1 500 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Sub-s. (5) substituted by s. 12 of Act No. 33 of 1986.]

Wording of Sections

155. Persons implicated in same offence may be tried together.—(1) Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.

(2) A receiver of property obtained by means of an offence shall for purposes of this section be deemed to be a participant in the offence in question.

156. Persons committing separate offences at same time and place may be tried together.—Any number of persons charged in respect of separate offences committed at the same

place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other such person or such persons.

157. Joinder of accused and separation of trials.—(1) An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.

158. Criminal proceedings to take place in presence of accused.—(1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.

(2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.

(b) A court may make a similar order on the application of an accused or a witness.

(3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would—

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient;
- (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

(4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

[S. 158 substituted by s. 7 of Act No. 86 of 1996.]

Wording of Sections

159. Circumstances in which criminal proceedings may take place in absence of accused.—(1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.

(2) If two or more accused appear jointly at criminal proceedings and—

- (a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative—
 - (i) that the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or

- (ii) that circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary; or
- (b) any of the accused is absent from the proceedings, whether under the provisions of subsection (1) or without leave of the court,

the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may—

- (aa) in the case of paragraph (a), authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose; and
- (bb) direct that the proceedings be proceeded with in the absence of the accused concerned.

(3) Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(4) If an accused who is in custody in terms of an order of court cannot, by reason of his physical indisposition or other physical condition, be brought before a court for the purposes of obtaining an order for his further detention, the court before which the accused would have been brought for purposes of such an order if it were not for the indisposition or other condition, may, upon application made by the prosecution at any time prior to the expiry of the order for his detention wherein the circumstances surrounding the indisposition or other condition are set out, supported by a certificate from a medical practitioner, order, in the absence of such an accused, that he be detained at a place indicated by the court and for the period which the court deems necessary in order that he can recover and be brought before the court so that an order for his further detention for the purposes of his trial can be obtained.

[Sub-s. (4) added by s. 9 of Act No. 5 of 1991.]

160. Procedure at criminal proceedings where accused is absent.—(1) If an accused referred to in section 159 (1) or (2) again attends the proceedings in question, he may, unless he was legally represented during his absence, examine any witness who testified during his absence, and inspect the record of the proceedings or require the court to have such record read over to him.

(2) If the examination of a witness under subsection (1) takes place after the evidence on behalf of the prosecution or any co-accused has been concluded, the prosecution or such co-accused may in respect of any issue raised by the examination, lead evidence in rebuttal of evidence relating to the issue so raised.

(3) (a) When the evidence on behalf of all the accused, other than an accused who is absent from the proceedings, is concluded, the court shall, subject to the provisions of paragraph (b), postpone the proceedings until such absent accused is in attendance and, if necessary, further postpone the proceedings until the evidence, if any, on behalf of that accused has been led.

(b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and

the court shall not be required to be differently constituted merely by reason of such separation.

(c) When, in the case of a trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he is again in attendance.

161. Witness to testify *viva voce*.—(1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.

(2) In this section the expression “*viva voce*” shall, in the case of a deaf and dumb witness, be deemed to include gesture-language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.

[Sub-s. (2) substituted by s. 1 of Act No. 135 of 1991.]

Wording of Sections

162. Witness to be examined under oath.—(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:—

“I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.”

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

163. Affirmation in lieu of oath.—(1) Any person who is or may be required to take the oath and—

- (a) who objects to taking the oath;
- (b) who objects to taking the oath in the prescribed form;
- (c) who does not consider the oath in the prescribed form to be binding on his conscience;
or
- (d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief,

shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:—

“I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth”.

(2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.

(3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

164. When unsworn or unaffirmed evidence admissible.—(1) Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath

or affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

165. Oath, affirmation or admonition may be administered by or through interpreter or intermediary.—Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.

[S. 165 substituted by s. 2 of Act No. 135 of 1991.]

Wording of Sections

166. Cross-examination and re-examination of witnesses.—(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.

(2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.

(3) (a) If it appears to a court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination regarding the length thereof or regarding any particular line of examination.

(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

[Sub-s. (3) added by s. 8 of Act No. 86 of 1996.]

167. Court may examine witness or person in attendance.—The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

168. Court may adjourn proceedings to any date.—A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.

169. Court may adjourn proceedings to any place.—A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it

necessary or expedient that the proceedings be continued at any place within its area of jurisdiction other than the one where the court is sitting, adjourn the proceedings to such other place, or, if the court with reference to any circumstance relevant to the proceedings deems it necessary or expedient that the proceedings be adjourned to a place other than the place at which the court is sitting, adjourn the proceedings, on the terms which to the court may seem proper, to any such place, whether within or outside the area of jurisdiction of such court, for the purpose of performing at such place any function of the court relevant to such circumstance.

[S. 169 substituted by s. 19 of Act No. 59 of 1983.]

Wording of Sections

170. Failure of accused to appear after adjournment or to remain in attendance.—(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[S. 170 amended by s. 11 of Act No. 56 of 1979 and substituted by s. 5 of Act No. 109 of 1984.

Sub-s. (2) substituted by s. 13 of Act No. 33 of 1986.]

Wording of Sections

170A. Evidence through intermediaries.—(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—

- (a) which is informally arranged to set that witness at ease;
- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) (a) The Minister may by notice in the *Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary who is not in the full-time employment of the State shall be paid such

travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.

(5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

(b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to—

- (i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;
- (ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
- (iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6) (a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.

(b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection—

- (i) the trial court; or
- (ii) the court considering an appeal or review,

has not delivered judgment.

[S. 170A inserted by s. 3 of Act No. 135 of 1991 and substituted by s. 1 of Act No. 17 of 2001.]

Wording of Sections

171. Evidence on commission.—(1) (a) Whenever criminal proceedings are pending before any court and it appears to such court on application made to it that the examination of any witness who is resident in the Republic is necessary in the interests of justice and that the attendance of such witness cannot be obtained without undue delay, expense or inconvenience the court may dispense with such attendance and issue a commission to any magistrate.

[Para. (a) substituted by s. 36 of Act No. 75 of 1996.]

Wording of Sections

(b) The specific matter with regard to which the evidence of the witness is required, shall be set out in the relevant application, and the court may confine the examination of the witness to such matter.

(c) Where the application is made by the State, the court may, as a condition of the commission, direct that the costs of legal representation for the accused at the examination be paid by the State.

(2) (a) The magistrate to whom the commission is issued, shall proceed to the place where the witness is or shall summon the witness before him or her, and take down the evidence in the manner set out in paragraph (b).

[Para. (a) substituted by s. 36 of Act No. 75 of 1996.]

Wording of Sections

(b) The witness shall give his or her evidence upon oath or affirmation, and such evidence shall be recorded and read over to the witness, and if he or she adheres thereto be subscribed by him or her and the magistrate concerned.

[Para. (b) substituted by s. 36 of Act No. 75 of 1996.]

Wording of Sections

(c)

[Para. (c) deleted by s. 36 of Act No. 75 of 1996.]

Wording of Sections

172. Parties may examine witness.—Any party to proceedings in which a commission is issued under section 171, may—

- (a) transmit interrogatories in writing which the court issuing the commission may think relevant to the issue, and the magistrate to whom the commission is issued, shall examine the witness upon such interrogatories; or
- (b) appear before such magistrate, either by a legal representative or, in the case of an accused who is not in custody or in the case of a private prosecutor, in person, and examine the witness.

[S. 172 substituted by s. 36 of Act No. 75 of 1996.]

Wording of Sections

173. Evidence on commission part of court record.—The Magistrate shall return the evidence in question to the court which issued the commission, and such evidence shall be open to the inspection of the parties to the proceedings and shall, in so far as it is admissible as evidence in such proceedings, form part of the record of such court.

[S. 173 substituted by s. 36 of Act No. 75 of 1996.]

Wording of Sections

174. Accused may be discharged at close of case for prosecution.—If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

175. Prosecution and defence may address court at conclusion of evidence.—(1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.

(2) The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address.

176. Judgment may be corrected.—When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment.

177. Court may defer final decision.—The court may at criminal proceedings defer its reasons

for any decision on any question raised at such proceedings, and the reasons so deferred shall, when given, be deemed to have been given at the time of the proceedings.

178. Arrest of person committing offence in court and removal from court of person disturbing proceedings.—(1) Where an offence is committed in the presence of the court, the presiding judge or judicial officer may order the arrest of the offender.

(2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and that he be detained in custody until the rising of the court.

CHAPTER 23 WITNESSES

179. Process for securing attendance of witness.—(1) (a) The prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of court the process of court for that purpose.

(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him to attend such criminal proceedings on the date and at the time and place specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have duly subpoenaed so to attend such criminal proceedings.

(2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court.

(3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court—

- (i) that he is unable to pay the necessary costs and fees; and
- (ii) that such witness is necessary and material for his defence,

such officer shall subpoena such witness.

(b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.

(4) For the purposes of this section “prescribed officer of the court” means the registrar, assistant registrar, clerk of the court or any officer prescribed by the rules of court.

180. Service of subpoena.—(1) A subpoena in criminal proceedings shall be served in the manner provided by the rules of court by a person empowered to serve a subpoena in criminal proceedings.

(2) A return by the person empowered to serve a subpoena in criminal proceedings, that the service thereof has been duly effected, may, upon the failure of a witness to attend the relevant proceedings, be handed in at such proceedings and shall be *prima facie* proof of such service.

181. Pre-payment of witness expenses.—Where a subpoena is served on a witness at a place outside the magisterial district from which the subpoena is issued, or, in the case of a superior court,

at a place outside the magisterial district in which the proceedings at which the witness is to appear are to take place, and the witness is required to travel from such place to the court in question, the necessary expenses to travel to and from such court and of sojourn at the court in question, shall on demand be paid to such witness at the time of service of the subpoena.

182. Witness from prison.—A prisoner who is in a prison shall be subpoenaed as a witness on behalf of the defence or a private prosecutor only if the court before which the prisoner is to appear as a witness authorizes that the prisoner be subpoenaed as a witness, and the court shall give such authority only if it is satisfied that the evidence in question is necessary and material for the defence or the private prosecutor, as the case may be, and that the public safety or order will not be endangered by the calling of the witness.

183. Witness to keep police informed of whereabouts.—(1) Any person who is advised in writing by any police official that he will be required as a witness in criminal proceedings, shall, until such criminal proceedings have been finally disposed of or until he is officially advised that he will no longer be required as a witness, keep such police official informed at all times of his full residential address or any other address where he may conveniently be found.

(2) Any person who fails to comply with the provisions of subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Sub-s. (2) substituted by s. 14 of Act No. 33 of 1986.]

Wording of Sections

184. Witness about to abscond and witness evading service of summons.—(1) Whenever any person is likely to give material evidence in criminal proceedings with reference to any offence, other than an offence referred to in Part III of Schedule 2 any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is about to abscond, issue a warrant for his arrest.

[Sub-s. (1) substituted by s. 3 of Act No. 126 of 1992.]

Wording of Sections

(2) If a person referred to in subsection (1) is arrested, the magistrate, regional magistrate or judge, as the case may be, may warn him to appear at the proceedings in question at a stated place and at a stated time and on a stated date and release him on any condition referred to in paragraph (a), (b) or (e) of section 62, in which event the provisions of subsections (1), (3) and (4) of section 66 shall *mutatis mutandis* apply with reference to any such condition.

(3) (a) A person who fails to comply with a warning under subsection (2) shall be guilty of an offence and liable to the punishment contemplated in paragraph (b) of this subsection.

(b) The provisions of section 170 (2) shall *mutatis mutandis* apply with reference to any person who is guilty of an offence under paragraph (a) of this subsection.

(4) Whenever any person is likely to give material evidence in criminal proceedings, any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is evading service of the relevant subpoena, issue a warrant for his arrest, whereupon the provisions of subsections (2) and (3) shall *mutatis mutandis* apply with reference to such person.

185. Detention of witness.—(1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the attorney-general likely to give evidence on behalf of the State at criminal proceedings in any court, and the attorney-general, from information placed before him—

- (i) is of the opinion that the personal safety of such person is in danger or that he may abscond or that he may be tampered with or that he may be intimidated; or
- (ii) deems it to be in the interests of such person or of the administration of justice that he be detained in custody,

the attorney-general may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.

(b) The attorney-general may in any case in which he is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than seventy-two hours unless the attorney-general within that time by way of affidavit places before a judge in chambers the information on which he ordered the detention of the person concerned and such further information as might become available to him, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.

(c) The attorney-general shall, as soon as he applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he has so applied for an order, and shall, where a judge under subsection (2) (a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the person so in charge of such refusal, whereupon the person so in charge shall without delay release the person detained.

(2) (a) The judge hearing the application under subsection (1) may, if it appears to him from the information placed before him by the attorney-general—

- (i) that there is a danger that the personal safety of the person concerned may be threatened or that he may abscond or that he may be tampered with or that he may be intimidated; or
- (ii) that it would be in the interests of the person concerned or of the administration of justice that he be detained in custody,

issue a warrant for the detention of such person.

(b) The decision of a judge under paragraph (a) shall be final: Provided that where a judge refuses an application and further information becomes available to the attorney-general concerning the person in respect of whom the application was refused, the attorney-general may again apply under subsection (1) (a) for the detention of that person.

(3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, or, where the person concerned is detained in terms of an order by the attorney-general under subsection (1) (b), such person shall, pending the decision of the judge under subsection (2) (a), be taken to a place determined by the attorney-general and detained there in accordance with the said regulations.

(4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless—

- (a) the attorney-general orders that he be released earlier; or
- (b) such proceedings have not commenced within six months from the date on which he is so detained, in which case he shall be released after the expiration of such period.

[Sub-s. (4) substituted by s. 2 (1) of Act No. 79 of 1978.]

(5) No person, other than an officer in the service of the State acting in the performance of his official duties, shall have access to a person detained under subsection (2), except with the consent of and subject to the conditions determined by the attorney-general or an officer in the service of the State delegated by him.

(6) Any person detained under subsection (2) shall be visited in private at least once during each week by a magistrate of the district or area in which he is detained.

(7) For the purposes of section 191 any person detained under subsection (2) of this section shall be deemed to have attended the criminal proceedings in question as a witness for the State during the whole of the period of his detention.

(8)

[Sub-s. (8) deleted by s. 69 of Act No. 88 of 1996.]

Wording of Sections

(9) (a) In this section the expression “judge in chambers” means a judge sitting behind closed doors when hearing the relevant application.

(b) No information relating to the proceedings under subsection (1) or (2) shall be published or be made public in any manner whatever.

185A.

[S. 185A inserted by s. 4 of Act No. 135 of 1991 and repealed by s. 24 (1) of Act No. 112 of 1998.]

Wording of Sections

186. Court may subpoena witness.—The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

187. Witness to attend proceedings and to remain in attendance.—A witness who is subpoenaed to attend criminal proceedings, shall attend the proceedings and remain in attendance at the proceedings, and a person who is in attendance at criminal proceedings, though not subpoenaed as a witness, and who is warned by the court to remain in attendance at the proceedings, shall remain in attendance at the proceedings, unless such witness or such person is excused by the court: Provided that the court may, at any time during the proceedings in question, order that any person, other than the accused, who is to be called as a witness, shall leave the court and remain absent from the proceedings until he is called, and that he shall remain in court after he has given evidence.

188. Failure by witness to attend or to remain in attendance.—(1) Any person who is subpoenaed to attend criminal proceedings and who fails to attend or to remain in attendance at such proceedings, and any person who is warned by the court to remain in attendance at criminal proceedings and who fails to remain in attendance at such proceedings, and any person so subpoenaed or so warned who fails to appear at the place and on the date and at the time to which the proceedings in question may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment contemplated in subsection (2).

[Sub-s. (1) substituted by s. 6 of Act No. 109 of 1984.]

Wording of Sections

(2) The provisions of section 170 (2) shall *mutatis mutandis* apply with reference to any person referred to in subsection (1).

189. Powers of court with regard to recalcitrant witness.—(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

[Sub-s. (1) substituted by s. 20 of Act No. 59 of 1983 and by s. 4 of Act No. 126 of 1992.]

Wording of Sections

(2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.

(3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).

(4) Any sentence imposed by any court under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by such court, and shall be served before any other sentence of imprisonment imposed on the person concerned.

(5) The court may, notwithstanding any action taken under this section, at any time conclude the criminal proceedings referred to in subsection (1).

(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him, unless he has such book, paper or document in court.

(7) Any lower court shall have jurisdiction to sentence any person to the maximum period of imprisonment prescribed by this section.

190. Impeachment or support of credibility of witness.—(1) Any party may in criminal proceedings impeach or support the credibility of any witness called against or on behalf of such party in any manner in which and by any evidence by which the credibility of such witness might on the thirtieth day of May, 1961, have been impeached or supported by such party.

(2) Any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the court, adverse to the party calling him), may, after such party or the court has asked the witness whether he did or did not previously make a statement with which his evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have been given to the witness, prove that he previously made a statement with which such evidence is inconsistent.

191. Payment of expenses of witness.—(1) Any person who attends criminal proceedings as a witness for the State shall be entitled to such allowance as may be prescribed under subsection (3): Provided that the judicial officer or the judge presiding at such proceedings may, if he thinks fit, direct that no such allowance or that only a part of such allowance shall be paid to any such witness.

(2) Subject to any regulation made under subsection (3), the judicial officer or the judge presiding at criminal proceedings may, if he thinks fit, direct that any person who has attended such proceedings as a witness for the accused, shall be paid such allowance as may be prescribed by such regulation, or such lesser allowance as such judicial officer or such judge may determine.

(3) The Minister may, in consultation with the Minister of Finance, by regulation prescribe a tariff of allowances which may be paid out of public moneys to witnesses in criminal proceedings, and may by regulation prescribe different tariffs for witnesses according to their several callings, occupations or stations in life, and according also to the distances to be travelled by such witnesses to reach the place where the proceedings in question are to take place, and may by regulation further prescribe the circumstances in which such allowances may be paid to any witness for an accused.

(4) The Minister may under subsection (3) empower any officer in the service of the State to authorize, in any case in which the payment of an allowance in accordance with the tariff prescribed may cause undue hardship or in the case of any person resident outside the Republic, the payment of an allowance in accordance with a higher tariff than the tariff prescribed.

(5) For the purposes of this section “witness” shall include any person necessarily required to accompany any witness on account of his youth, old age or infirmity.

191A. Witness services.—(1) The Minister has the power to determine services to be provided to a witness who is required to give evidence in any court of law.

(2) The Minister may make regulations relating to—

- (a) the assistance of, and support to, witnesses at courts;
- (b) the establishment of reception centres for witnesses at courts;
- (c) the counselling of witnesses; and
- (d) any other matter which the Minister deems expedient to prescribe in order to provide services to witnesses at courts.

(3) Any regulation made under this section which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(4) Any regulation made under this section may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding three years.

(5) Any regulation made under this section must, before publication thereof in the *Gazette*, be submitted to Parliament.

[S. 191A inserted by s. 25 of Act No. 112 of 1998.]

192. Every witness competent and compellable unless expressly excluded.—Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

193. Court to decide upon competency of witness.—The court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence.

194. Incompetency due to state of mind.—No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.

195. Evidence for prosecution by husband or wife of accused.—(1) The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such

proceedings where the accused is charged with—

- (a) any offence committed against the person of either of them or of a child of either of them;
- (b) any offence under Chapter 8 of the Child Care Act, 1983 (Act 74 of 1983), committed in respect of any child of either of them;
- (c) any contravention of any provision of section 31 (1) of the Maintenance Act, 1998, or of such provision as applied by any other law;

[Para. (c) substituted by s. 45 of Act No. 99 of 1998.]

Wording of Sections

- (d) bigamy;
- (e) incest;
- (f) abduction;
- (g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 13, 17 or 20 of the Sexual Offences Act, 1957 (Act 23 of 1957);

[Para. (g) amended by s. 1 of Act No. 49 of 1996 and by s. 4 of Act No. 18 of 1996.]

Wording of Sections

- (h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;
- (i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h).

[Sub-s. (1) amended by s. 5 of Act No. 72 of 1985 and by s. 7 of Act No. 26 of 1987 and substituted by s. 6 of Act No. 45 of 1988.]

Wording of Sections

(2) For the purposes of the law of evidence in criminal proceedings, “marriage” shall include a customary marriage or customary union concluded under the indigenous law and custom of any of the indigenous peoples of the Republic of South Africa or any marriage concluded under any system of religious law.

[Sub-s. (2) substituted by s. 4 of Act No. 18 of 1996.]

Wording of Sections

196. Evidence of accused and husband or wife on behalf of accused.—(1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that—

- (a) an accused shall not be called as a witness except upon his own application;
- (b) the wife or husband of an accused shall not be a compellable witness where a co-accused calls that wife or husband as a witness for the defence.

[Para. (b) substituted by s. 7 of Act No. 45 of 1988.]

Wording of Sections

(2) The evidence which an accused may, upon his own application, give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against

such co-accused.

(3) An accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes to give evidence, do so on oath or, as the case may be, by affirmation.

197. Privileges of accused when giving evidence.—An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he has committed or has been convicted of or has been charged with any offence other than the offence with which he is charged, or that he is of bad character, unless—

- (a) he or his legal representative asks any question of any witness with a view to establishing his own good character or he himself gives evidence of his own good character, or the nature or conduct of the defence is such as to involve imputation of the character of the complainant or any other witness for the prosecution;
- (b) he gives evidence against any other person charged with the same offence or an offence in respect of the same facts;
- (c) the proceedings against him are such as are described in section 240 or 241 and the notice under those sections has been given to him; or
- (d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is charged.

198. Privilege arising out of marital state.—(1) A husband shall not at criminal proceedings be compelled to disclose any communication which his wife made to him during the marriage, and a wife shall not at criminal proceedings be compelled to disclose any communication which her husband made to her during the marriage.

(2) Subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.

[Sub-s. (2) substituted by s. 8 of Act No. 45 of 1988.]

Wording of Sections

199. No witness compelled to answer question which the witness's husband or wife may decline.—No person shall at criminal proceedings be compelled to answer any question or to give any evidence, if the question or evidence is such that under the circumstances the husband or wife of such person, if under examination as a witness, may lawfully refuse and cannot be compelled to answer or to give it.

200. Witness not excused from answer establishing civil liability on his part.—A witness in criminal proceedings may not refuse to answer any question relevant to the issue by reason only that the answer establishes or may establish a civil liability on his part.

201. Privilege of legal practitioner.—No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.

202. Privilege from disclosure on ground of public policy or public interest.—Except as is in this Act provided and subject to the provisions of any other law, no witness in criminal proceedings shall be compellable or permitted to give evidence as to any fact, matter or thing or as to any communication made to or by such witness, if such witness would on the thirtieth day of May, 1961, not have been compellable or permitted to give evidence with regard to such fact, matter or thing or communication by reason that it should not, on the grounds of public policy or from regard to public interest, be disclosed, and that it is privileged from disclosure: Provided that any person may in criminal proceedings adduce evidence of any communication alleging the commission of an offence, if the making of that communication *prima facie* constitutes an offence, and the judge or judicial officer presiding at such proceedings may determine whether the making of such communication *prima facie* does or does not constitute an offence, and such determination shall, for the purpose of such proceedings, be final.

203. Witness excused from answering incriminating question.—No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge.

204. Incriminating evidence by witness for prosecution.—(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—

- (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness—
 - (i) that he is obliged to give evidence at the proceedings in question;
 - (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
 - (iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;
 - (iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
- (b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him—

- (a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

- (b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

[Para. (b) amended by s. 1 of Act No. 49 of 1996.]

Wording of Sections

205. Judge, regional court magistrate or magistrate may take evidence as to alleged offence.—*(1) A judge of the supreme court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4), upon the request of an attorney-general or a public prosecutor authorized thereto in writing by the attorney-general, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the attorney-general or the public prosecutor authorized thereto in writing by the attorney-general, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the attorney-general or public prosecutor concerned prior to the date on which he is required to appear before a judge, regional court magistrate or magistrate, he shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.

(4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

[S. 205 substituted by s. 11 of Act No. 204 of 1993.]

Wording of Sections

206. The law in cases not provided for.—The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law.

207. Saving of special provisions in other laws.—No provision of this Chapter shall be construed as modifying any provision of any other law whereby in any criminal proceedings referred to in such law a person is deemed a competent witness.

CHAPTER 24 EVIDENCE

208. Conviction may follow on evidence of single witness.—An accused may be convicted of any offence on the single evidence of any competent witness.

209. Conviction may follow on confession by accused.—An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

210. Irrelevant evidence inadmissible.—No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.

211. Evidence during criminal proceedings of previous convictions.—Except where otherwise expressly provided by this Act or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he has been so convicted.

212. Proof of certain facts by affidavit or certificate.—(1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular department or sub-department of the State or of a provincial administration or in any branch or office of such department or sub-department or in any particular court of law or in any particular bank, or the question arises in such proceedings whether any particular functionary in any such department, sub-department, branch or office did or did not perform any particular act or did or did not take part in any particular transaction, a document purporting to be an affidavit made by a person who in that affidavit alleges—

- (a) that he is in the service of the State or a provincial administration or of the bank in question, and that he is employed in the particular department or sub-department or the particular branch or office thereof or in the particular court or bank;
- (b) that—
 - (i) if the act, transaction or occurrence in question had taken place in such department, sub-department, branch or office or in such court or bank; or
 - (ii) if such functionary had performed such particular act or had taken part in such particular transaction,it would in the ordinary course of events have come to his, the deponent's, knowledge and a record thereof, available to him, would have been kept; and
- (c) that it has not come to his knowledge—
 - (i) that such act, transaction or occurrence took place; or
 - (ii) that such functionary performed such act or took part in such transaction,and that there is no record thereof,

shall, upon its mere production at such proceedings, be *prima facie* proof that the act, transaction or occurrence in question did not take place, or as the case may be, that the functionary concerned did not perform the act in question or did not take part in the transaction in question.

(2) Whenever in criminal proceedings the question arises whether any person bearing a particular name did or did not furnish any particular officer in the service of the State or of a provincial administration with any particular information or document, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is the said officer and that no person bearing the said name furnished him with such information or document, shall, upon its mere production at such proceedings, be *prima facie* proof that the said person did not furnish the said officer with any such information or document.

(3) Whenever in criminal proceedings the question arises whether any matter has been registered under any law or whether any fact or transaction has been recorded thereunder or whether anything connected therewith has been done thereunder, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is the person upon whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction or to do such thing connected therewith and that he has registered the matter in question or that he has recorded the fact or transaction in question or that he has done the thing connected therewith or that he has satisfied himself that the matter in question was registered or that the fact or transaction in question was recorded or that the thing connected therewith was done, shall, upon its mere production at such proceedings, be *prima facie* proof that such matter was registered or, as the case may be, that such fact or transaction was recorded or that the thing connected therewith was done.

[Sub-s. (3) substituted by s. 12 of Act No. 56 of 1979.]

Wording of Sections

(4) (a) Whenever any fact established by any examination or process requiring any skill—

- (i) in biology, chemistry, physics, astronomy, geography or geology;
- (ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
- (iii) in computer science or in any discipline of engineering;
- (iv) in anatomy or in human behavioural sciences;
- (v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
- (vi) in ballistics, in the identification of finger prints or palm-prints or in the examination of disputed documents,

is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.

[Para. (a) amended by ss. 46 and 47 of Act No. 97 of 1986, by s. 40 of Act No. 122 of 1991 and by s. 9 of Act No. 86 of 1996 and substituted by s. 6 of Act No. 34 of 1998.]

Wording of Sections

(b) Any person who issues a certificate under paragraph (a) and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

(5) Whenever the question as to the existence and nature of a precious metal or any precious stone is or may become relevant to the issue in criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is an appraiser of precious metals or precious stones, that he is in the service of the State, that such precious metal or such precious stone is indeed a precious metal or a precious stone, as the case may be, that it is a precious metal or a precious stone of a particular kind and appearance and that the mass or value of such precious metal or such precious stone is as specified in that affidavit, shall, upon its mere production at such proceedings, be *prima facie* proof that it is a precious metal or a precious stone of a particular kind and appearance and the mass or value of such precious metal or such precious stone is as so specified.

[Sub-s. (5) substituted by s. 11 of Act No. 5 of 1991.]

Wording of Sections

(6) In criminal proceedings in which the finding of or action taken in connection with any particular finger-print or palm-print is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the State and that he in the performance of his official duties—

- (a) found such finger-print or palm-print at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or
- (b) dealt with such finger-print or palm-print in the manner stated in the affidavit,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such finger-print or palm-print was so found or, as the case may be, was so dealt with.

(7) In criminal proceedings in which the physical condition or the identity, in or at any hospital, nursing home, ambulance or mortuary, of any deceased person or of any dead body is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges—

- (a) that he is employed at or in connection with the hospital, nursing home, ambulance or mortuary in question; and
- (b) that he during the performance of his official duties observed the physical characteristics or condition of the deceased person or of the dead body in question; and
- (c) that while the deceased person or the dead body in question was under his care, such deceased person or such dead body had or sustained the injuries or wounds described in the affidavit, or sustained no injuries or wounds; or
- (d) that he pointed out or handed over the deceased person or the dead body in question to a specified person or that he left the deceased person or the dead body in question in the care of a specified person or that the deceased person or the dead body in question was pointed out or handed over to him or left in his care by a specified person,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged.

(8) (a) In criminal proceedings in which the receipt, custody, packing, marking, delivery or despatch of any finger-print or palm-print, article of clothing, specimen, tissue (as defined in Act section 1 of the Anatomical Donations and Post-Mortem Examinations Act, 1970 (Act Act 24 of 1970)), or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges—

- (i) that he is in the service of the State or is in the service of or is attached to the South African Institute for Medical Research, any university in the Republic or any body designated by the Minister under subsection (4);

[Sub-para. (i) amended by s. 46 of Act No. 97 of 1986.]

Wording of Sections

- (ii) that he in the performance of his official duties—
 - (aa) received from any person, institute, State department or body specified in the affidavit, a finger-print or palm-print, article of clothing, specimen, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he packed or marked in the manner described in the affidavit;
 - (bb) delivered or despatched to any person, institute, State department or body specified in the affidavit, a finger-print or palm-print, article of clothing, specimen, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he packed or marked in the manner described in the affidavit;
 - (cc) during a period specified in the affidavit, had a finger-print or palm-print, article of clothing, specimen, tissue or object described in the affidavit in his custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged: Provided that the person who may make such affidavit in any case relating to any article of clothing, specimen or tissue, may issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.

(b) Any person who issues a certificate under paragraph (a) and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

- (9) In criminal proceedings in which it is relevant to prove—

- (a) the details of any consignment of goods delivered to the Railways Administration for conveyance to a specified consignee, a document purporting to be an affidavit made by a person who in that affidavit alleges—
 - (i) that he consigned the goods set out in the affidavit to a consignee specified in the affidavit;
 - (ii) that, on a date specified in the affidavit, he delivered such goods or caused such goods to be delivered to the Railways Administration for conveyance to such consignee, and that the consignment note referred to in such affidavit relates to such goods,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged; or

- (b) that the goods referred to in paragraph (a) were received by the Railways Administration for conveyance to a specified consignee or that such goods were handled or transshipped en route by the Railways Administration, a document purporting to be an affidavit made by a person who in that affidavit alleges—
 - (i) that he at all relevant times was in the service of the Railways Administration in a stated capacity;
 - (ii) that he in the performance of his official duties received or, as the case may be,

handled or transshipped the goods referred to in the consignment note referred to in paragraph (a),

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged.

(10) (a) The Minister may in respect of any measuring instrument as defined in section 1 of the Trade Metrology Act, 1973 (Act 77 of 1973), by notice in the *Gazette* prescribe the conditions and requirements which shall be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact which it purports to prove, and if the Minister has so prescribed such conditions and requirements and upon proof that such conditions and requirements have been complied with in respect of any particular measuring instrument, the measuring instrument in question shall, for the purposes of proving the fact which it purports to prove, be accepted at criminal proceedings as proving the fact recorded by it, unless the contrary is proved.

(b) An affidavit in which the deponent declares that the conditions and requirements referred to in paragraph (a) have been complied with in respect of the measuring instrument in question shall, upon the mere production thereof at the criminal proceedings in question, be *prima facie* proof that such conditions and requirements have been complied with.

(11) (a) The Minister may with reference to any syringe intended for the drawing of blood or any receptacle intended for the storing of blood, by notice in the *Gazette* prescribe the conditions and requirements relating to the cleanliness and sealing or manner of sealing thereof which shall be complied with before any such syringe or receptacle may be used in connection with the analysing of the blood of any person for the purposes of criminal proceedings, and if—

- (i) any such syringe or receptacle is immediately before being used for the said purpose, in a sealed condition, or contained in a holder which is sealed with a seal or in a manner prescribed by the Minister; and
- (ii) any such syringe, receptacle or holder bears an endorsement that the conditions and requirements prescribed by the Minister have been complied with in respect of such syringe or receptacle,

proof at criminal proceedings that the seal, as thus prescribed, of such syringe or receptacle was immediately before the use of such syringe or receptacle for the said purpose intact, shall be deemed to constitute *prima facie* proof that the syringe or the receptacle in question was then free from any substance or contamination which could materially affect the result of the analysis in question.

(b) An affidavit in which the deponent declares that he had satisfied himself before using the syringe or receptacle in question—

- (i) that the syringe or receptacle was sealed as provided in paragraph (a) (i) and that the seal was intact immediately before the syringe or receptacle was used for the said purpose; and
- (ii) that the syringe, receptacle or, as the case may be, the holder contained the endorsement referred to in paragraph (a) (ii),

shall, upon the mere production thereof at the proceedings in question, be *prima facie* proof that the syringe or receptacle was so sealed, that the seal was so intact and that the syringe, receptacle or holder, as the case may be, was so endorsed.

(c) Any person who for the purposes of this subsection makes or causes to be made a false endorsement on any syringe, receptacle or holder, knowing it to be false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

(12) The court before which an affidavit or certificate is under any of the preceding provisions

of this section produced as *prima facie* proof of the relevant contents thereof, may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and such interrogatories and any reply thereto purporting to be a reply from such person, shall likewise be admissible in evidence at such proceedings.

(13) No provision of this section shall affect any other law under which any certificate or other document is admissible in evidence, and the provisions of this section shall be deemed to be additional to and not in substitution of any such law.

212A. Proof of certain facts by affidavit from person in foreign country.—(1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place—

- (a) in any particular department or sub-department of a state or territory outside the Republic;
- (b) in any particular department or sub-department of an administration in such state or territory which is similar to a provincial administration in the Republic;
- (c) in any branch or office of a department or sub-department contemplated in paragraph (a) or (b);
- (d) in any particular court of law in such state or territory; or
- (e) in any particular institution in such state or territory which is similar to a bank in the Republic,

or whenever the question arises in such proceedings whether any particular functionary in any such department, sub-department, branch, office, court or institution did or did not perform any particular act or did or did not take part in any particular transaction, the provisions of subsections (1), (2) and (3) of section 212 shall *mutatis mutandis* apply: Provided that for the purposes of this section a document purporting to be an affidavit shall have no effect unless—

- (a) it is obtained in terms of an order of a competent court or on the authority of a competent government institution of the state or territory concerned, as the case may be;
- (b) it is authenticated in the manner prescribed in the rules of court for the authentication of documents executed outside the Republic; or
- (c) it is authenticated by a person, and in the manner, contemplated in section 8 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963).

(2) The admissibility and evidentiary value of an affidavit contemplated in subsection (1) shall not be affected by the fact that the form of the oath, confirmation or attestation thereof differs from the form of the oath, confirmation or attestation prescribed in the Republic.

(3) A court before which an affidavit contemplated in subsection (1) is placed, may, in order to clarify obscurities in the said affidavit, at the request of a party to the proceedings order that a supplementary affidavit be submitted or that oral evidence be heard: Provided that oral evidence shall only be heard if the court is of the opinion that it is in the interests of the administration of justice and that a party to the proceedings would be materially prejudiced should oral evidence not be heard.

[S. 212A inserted by s. 5 of Act No. 157 of 1993.]

212B. Proof of undisputed facts.—(1) If an accused has appointed a legal adviser and, at any stage during the proceedings, it appears to a public prosecutor that a particular fact or facts which must be proved in a charge against an accused is or are not in issue or will not be placed in issue in

criminal proceedings against the accused, he or she may, notwithstanding section 220, forward or hand a notice to the accused or his or her legal adviser setting out that fact or those facts and stating that such fact or facts shall be deemed to have been proved at the proceedings unless notice is given that any such fact will be placed in issue.

(2) The first-mentioned notice contemplated in subsection (1) shall be sent by certified mail or handed to the accused or his or her legal adviser personally at least 14 days before the commencement of the criminal proceedings or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon by the accused or his or her legal adviser and the prosecutor.

(3) If any fact mentioned in such notice is intended to be placed in issue at the proceedings, the accused or his or her legal representative shall at least five days before the commencement or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon with the prosecutor deliver a notice in writing to that effect to the registrar or the clerk of the court, as the case may be, or orally notify the registrar or the clerk of the court to that effect in which case the registrar or the clerk of the court shall record such notice.

(4) If, after receipt of the first-mentioned notice contemplated in subsection (1), any fact mentioned in that notice is not placed in issue as contemplated in subsection (3), the court may deem such fact or facts, subject to the provisions of subsections (5) and (6), to have been sufficiently proved at the proceedings concerned.

(5) If a notice was forwarded or handed over by a prosecutor as contemplated in subsection (1), the prosecutor shall notify the court at the commencement of the proceedings of such fact and of the reaction thereto, if any, and the court shall thereupon institute an investigation into such of the facts which are not disputed and enquire from the accused whether he or she confirms the information given by the prosecutor and whether he or she understands his or her rights and the implications of the procedure and where the legal adviser of the accused replies to any question by the court under this section, the accused shall be required by the court to declare whether he or she confirms such reply or not.

(6) The court may on its own initiative or at the request of the accused order oral evidence to be adduced regarding any fact contemplated in subsection (4).

[S. 212B inserted by s. 10 of Act No. 86 of 1997.]

213. Proof of written statement by consent.—(1) In criminal proceedings a written statement by any person, other than an accused at such proceedings, shall, subject to the provisions of subsection (2), be admissible as evidence to the same extent as oral evidence to the same effect by such person.

(2) (a) The statement shall purport to be signed by the person who made it, and shall contain a declaration by such person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or which he did not believe to be true.

(b) If the person who makes the statement cannot read it, it shall be read to him before he signs it, and an endorsement shall be made thereon by the person who so read the statement to the effect that it was so read.

(c) A copy of the statement, together with a copy of any document referred to in the statement as an exhibit, or with such information as may be necessary in order to enable the party on whom it is served to inspect such document or a copy thereof, shall, before the date on which the document is to be tendered in evidence, be served on each of the other parties to the proceedings, and any such party may, at least two days before the commencement of the proceedings, object to the statement being tendered in evidence under this section.

(d) If a party objects under paragraph (c) that the statement in question be tendered in evidence, the statement shall not, but subject to the provisions of paragraph (e), be admissible as evidence under this section.

(e) If a party does not object under paragraph (c) or if the parties agree before or during the proceedings in question that the statement may be so tendered, the statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(f) When the documents referred to in paragraph (c) are served on an accused, the documents shall be accompanied by a written notification in which the accused is informed that the statement in question will be tendered in evidence at his trial in lieu of the State calling as a witness the person who made the statement but that such statement shall not without the consent of the accused be so tendered in evidence if he notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he objects to the statement so being tendered in evidence.

(3) The parties to criminal proceedings may, before or during such proceedings, agree that any written statement referred to in subsections (2) (a) and (b) which has not been served in terms of subsection (2) (c) be tendered in evidence at such proceedings, whereupon such statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(4) Notwithstanding that a written statement made by any person may be admissible as evidence under this section—

- (a) a party by whom or on whose behalf a copy of the statement was served, may call such person to give oral evidence;
- (b) the court may, of its own motion, and shall, upon the application of any party to the proceedings in question, cause such person to be subpoenaed to give oral evidence before the court or the court may, where the person concerned is resident outside the Republic, issue a commission in respect of such person in terms of section 171.

(5) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section, shall be treated as if it had been produced as an exhibit and identified in court by the person who made the statement.

(6) Any person who makes a statement which is admitted as evidence under this section and who in such statement wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury, shall be deemed to have committed the offence of perjury and shall, upon conviction, be liable to the punishment prescribed for the offence of perjury.

214. Evidence recorded at preparatory examination admissible at trial in certain circumstances.—The evidence of any witness recorded at a preparatory examination—

- (a) shall be admissible in evidence on the trial of the accused following upon such preparatory examination, if it is proved to the satisfaction of the court—
 - (i) that the witness is dead;
 - (ii) that the witness is incapable of giving evidence;
 - (iii) that the witness is too ill to attend the trial; or
 - (iv) that the witness is being kept away from the trial by the means and contrivance of the accused; and
 - (v) that the evidence tendered is the evidence recorded before the magistrate or, as the case may be, the regional magistrate,

and if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full

opportunity of cross-examining such witness;

- (b) may, if such witness cannot, after a diligent search, be found for purposes of the trial of the accused following upon such preparatory examination, or cannot be compelled to attend such trial, in the discretion of the court, but subject to the provisions of subparagraph (v) of paragraph (a), be read as evidence at such trial, if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness.

215. Evidence recorded at former trial admissible at later trial in certain circumstances.—The evidence of a witness given at a former trial may, in the circumstances referred to in section 214, *mutatis mutandis* be admitted in evidence at any later trial of the same person upon the same charge.

216.

[S. 216 repealed by s. 9 of Act No. 45 of 1988.]

Wording of Sections

217. Admissibility of confession by accused.—(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided—

- (a) that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and
- (b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question—
 - (i) be admissible in the evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

[Sub-para. (1) substituted by s. 13 of Act No. 56 of 1979.]

- (ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

- (2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in

rebuttal of the presumption under proviso (b) to subsection (1).

(3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him—

- (a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and
- (b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.

218. Admissibility of facts discovered by means of inadmissible confession.—(1) Evidence may be admitted at criminal proceedings of any fact otherwise inadmissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.

(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

219. Confession not admissible against another.—No confession made by any person shall be admissible as evidence against another person.

219A. Admissibility of admission by accused.—(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained—

- (a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and
- (b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).

[S. 219A inserted by s. 14 of Act No. 56 of 1979.]

220. Admissions.—An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be

sufficient proof of such fact.

[S. 220 substituted by s. 12 of Act No. 86 of 1996.]

Wording of Sections

221. Admissibility of certain trade or business records.—(1) In criminal proceedings in which direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon production of the document, be admissible as evidence of that fact if—

- (a) the document is or forms part of a record relating to any trade or business and has been compiled in the course of that trade or business, from information supplied, directly or indirectly, by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and
- (b) the person who supplied the information recorded in the statement in question is dead or is outside the Republic or is unfit by reason of his physical or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected, having regard to the time which has elapsed since he supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he supplied.

(2) For the purpose of deciding whether or not a statement is admissible as evidence under this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

(3) In estimating the weight to be attached to a statement admissible as evidence under this section, regard shall be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement, did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(4) No provision of this section shall prejudice the admissibility of any evidence which would be admissible apart from the provisions of this section.

(5) In this section—

“business” includes any public transport, public utility or similar undertaking carried on by a local authority, and the activities of the Post Office and the Railway Administration;

“document” includes any device by means of which information is recorded or stored; and

“statement” includes any representation of fact, whether made in words or otherwise.

222. Application to criminal proceedings of certain provisions of Civil Proceedings Evidence Act, 1965, relating to documentary evidence.—The provisions of sections 33 to 38 inclusive, of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965), shall *mutatis mutandis* apply with reference to criminal proceedings.

223.

[S. 223 repealed by s. 9 of Act No. 45 of 1988.]

Wording of Sections

224. Judicial notice of laws and other published matter.—Judicial notice shall in criminal proceedings be taken of—

- (a) any law or any matter published in a publication which purports to be the *Gazette* or the *Official Gazette* of any province;

[Para. (a) amended by s. 1 of Act No. 49 of 1996.]

Wording of Sections

- (b) any law which purports to be published under the superintendence or authority of the Government Printer.

225. Evidence of prints or bodily appearance of accused.—(1) Whenever it is relevant at criminal proceedings to ascertain whether any finger-print, palm-print or footprint of an accused at such proceedings corresponds to any other finger-print, palm-print or foot-print, or whether the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the finger-prints, palm-prints or foot-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the fingerprint, palm-print or foot-print in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of section 37, or that it was taken or ascertained against the wish or the will of the accused concerned.

226. Evidence of no sexual intercourse between spouses admissible.—For the purposes of rebutting the presumption that a child to whom a married woman has given birth is the offspring of her husband, such woman or her husband or both of them may in criminal proceedings give evidence that they had no sexual intercourse with one another during the period when the child was conceived.

227. Evidence of character.—(1) Evidence as to the character of an accused or as to the character of any female against or in connection with whom any offence of an indecent nature is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the thirtieth day of May, 1961.

(2) Evidence as to sexual intercourse by, or any sexual experience of, any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.

(3) Before an application for leave contemplated in subsection (2) is heard, the court shall direct that any person whose presence is not necessary may not be present at the proceedings, and the court may direct that a female referred to in subsection (2) may not be present.

(4) The provisions of this section are *mutatis mutandis* applicable in respect of a male against or in connection with whom any offence of an indecent nature is alleged to have been committed.

[S. 227 substituted by s. 2 of Act No. 39 of 1989.]

Wording of Sections

228. Evidence of disputed writing.—Comparison at criminal proceedings of a disputed writing

with any writing proved to be genuine, may be made by a witness, and such writings and the evidence of any witness with respect thereto, may be submitted as proof of the genuineness or otherwise of the writing in dispute.

229. Evidence of times of sunrise and sunset.—(1) The Minister may from time to time by notice in the *Gazette* approve of tables prepared at any official observatory in the Republic of the times of sunrise and sunset on particular days at particular places in the Republic or any portion thereof, and appearing in any publication specified in the notice, and thereupon such tables shall, until the notice is withdrawn, on the mere production thereof in criminal proceedings be admissible as proof of such times.

(2) Tables in force immediately prior to the commencement of this Act by virtue of the provisions of section 26 of the General Law Amendment Act, 1952 (Act 32 of 1952), shall be deemed to be tables approved under subsection (1) of this section.

230. Evidence and sufficiency of evidence of appointment to public office.—Any evidence which, on the thirtieth day of May, 1961—

- (a) would have been admissible as proof of the appointment of any person to any public office or the authority of any person to act as a public officer, shall be admissible in evidence in criminal proceedings;
- (b) would have been deemed sufficient proof of the appointment of any person to any public office or of the authority of any person to act as a public officer, shall in criminal proceedings be deemed to be sufficient proof of such appointment or authority.

231. Evidence of signature of public officer.—Any document—

- (a) which purports to bear the signature of any person holding a public office; and
- (b) which bears a seal or stamp purporting to be a seal or stamp of the department, office or institution to which such person is attached,

shall, upon the mere production thereof at criminal proceedings, be *prima facie* proof that such person signed such document.

232. Article may be proved in evidence by means of photograph thereof.—(1) Any court may in respect of any article, other than a document, which any party to criminal proceedings may wish to produce to the court as admissible evidence at such proceedings, permit such party to produce as evidence, in lieu of such article, any photograph thereof, notwithstanding that such article is available and can be produced in evidence.

(2) The court may, notwithstanding the admission under subsection (1) of the photograph of any article, on good cause require the production of the article in question.

233. Proof of public documents.—(1) Whenever any book or other document is of such a public nature as to be admissible in evidence upon its mere production from proper custody, any copy thereof or extract therefrom shall be admissible in evidence at criminal proceedings if it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.

(2) Such officer shall furnish such certified copy or extract to any person applying therefor, upon payment of an amount in accordance with the tariff of fees prescribed by or under any law or, if no such tariff has been so prescribed, an amount in accordance with such tariff of fees as the Minister, in consultation with the Minister of Finance, may from time to time determine.

234. Proof of official documents.—(1) It shall, at criminal proceedings, be sufficient to prove an original official document which is in the custody or under the control of any State official by virtue of his office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the department concerned or by any State official authorized thereto by such head, is produced in evidence at such proceedings.

(2) (a) An original official document referred to in subsection (1), other than the record of judicial proceedings, may be produced at criminal proceedings only upon the order of the attorney-general.

(b) It shall not be necessary for the head of the department concerned to appear in person to produce an original document under paragraph (a), but such document may be produced by any person authorized thereto by such head.

(3) Any official who, under subsection (1), certifies any copy or extract as true knowing that such copy or extract is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years.

235. Proof of judicial proceedings.—(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.

(2) Any person who, under subsection (1), certifies any copy as true knowing that such copy is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years.

236. Proof of entries in accounting records and documentation of banks.—(1) The entries in the accounting records of a bank, and any document which is in the possession of any bank and which refers to the said entries or to any business transaction of the bank, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

- (a) that he is in the service of the bank in question;
- (b) that such accounting records or document is or has been the ordinary records or document of such bank;

[Para. (b) substituted by s. 12 (a) of Act No. 204 of 1993.]

Wording of Sections

- (c) that the said entries have been made in the usual and ordinary course of the business of such bank or the said document has been compiled, printed or obtained in the usual and ordinary course of the business of such bank; and
- (d) that such accounting records or document is in the custody or under the control of such bank,

[Para. (d) substituted by s. 12 (b) of Act No. 204 of 1993.]

Wording of Sections

be *prima facie* proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document.

(2) Any entry in any accounting record referred to in subsection (1) or any document referred to in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

- (a) that he is in the service of the bank in question;
- (b) that he has examined the entry, accounting record or document in question; and
- (c) that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) Any party at the proceedings in question against whom evidence is adduced in terms of this section or against whom it is intended to adduce evidence in terms of this section, may, upon the order of the court before which the proceedings are pending, inspect the original of the document or entry in question and any accounting record in which such entry appears or of which such entry forms part, and such party may make copies of such document or entry, and the court shall, upon the application of the party concerned, adjourn the proceedings for the purpose of such inspection or the making of such copies.

(4) No bank shall be compelled to produce any accounting record referred to in subsection (1) at any criminal proceedings, unless the court concerned orders that any such record be produced.

(5) In this section—

“document” includes a recording or transcribed computer printout produced by any mechanical or electronic device and any device by means of which information is recorded or stored; and

“entry” includes any notation in the accounting records of a bank by any means whatsoever.

[S. 236 substituted by s. 45 of Act No. 129 of 1993.]

Wording of Sections

236A. Proof of entries in accounting records and documentation of banks in countries outside Republic.—(1) The entries in the accounting records of an institution in a state or territory outside the Republic which is similar to a bank in the Republic, and any document which is in the possession of such an institution and which refers to the said entries or to any business transaction of the institution, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

- (a) that he is in the service of the institution in question;
- (b) that such accounting records or document are or were the ordinary records or document of the institution;
- (c) that the said entries have been made in the usual and ordinary course of the business of such institution; and
- (d) that such accounting records or document is in the custody or under the control of such institution,

be *prima facie* proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document.

(2) Any entry in any accounting record contemplated in subsection (1) or any document contemplated in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges—

- (a) that he is in the service of the institution in question;

- (b) that he has examined the entry, accounting record or document in question; and
- (c) that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) A document purporting to be an affidavit shall for the purposes of this section have no effect unless—

- (a) it is obtained in terms of an order of a competent court or on the authority of a competent government institution of the state or territory concerned, as the case may be;
- (b) it is authenticated in the manner prescribed in the rules of court for the authentication of documents executed outside the Republic; or
- (c) it is authenticated by a person, and in the manner, contemplated in section 8 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963).

(4) The admissibility and evidentiary value of an affidavit contemplated in subsections (1) and (2) shall not be affected by the fact that the form of the oath, confirmation or attestation thereof differs from the form of the oath, confirmation or attestation prescribed in the Republic.

(5) A court before which an affidavit contemplated in subsections (1) and (2) is placed may, in order to clarify obscurities in the said affidavit, on the request of a party to the proceedings order that a supplementary affidavit be submitted or that oral evidence be heard: Provided that oral evidence shall only be heard if the court is of the opinion that it is in the interests of the administration of justice and that a party to the proceedings would be materially prejudiced should oral evidence not be heard.

(6) In this section—

“document” includes a recording or transcribed computer printout produced by any mechanical or electronic device and any device by means of which information is recorded or stored; and

“entry” includes any notation, by any means whatsoever, in the accounting records of an institution contemplated in subsection (1).

[S. 236A inserted by s. 6 of Act No. 157 of 1993.]

237. Evidence on charge of bigamy.—(1) At criminal proceedings at which an accused is charged with bigamy, it shall, as soon as it is proved that a marriage ceremony, other than the ceremony relating to the alleged bigamous marriage, took place within the Republic between the accused and another person, be presumed, unless the contrary is proved, that the marriage was on the date of the solemnization thereof lawful and binding.

(2) At criminal proceedings at which an accused is charged with bigamy, it shall be presumed, unless the contrary is proved, that at the time of the solemnization of the alleged bigamous marriage there subsisted between the accused and another person a lawful and binding marriage—

- (a) if there is produced at such proceedings, in any case in which the marriage is alleged to have been solemnized within the Republic, an extract from the marriage register which purports—
 - (i) to be a duplicate original or a copy of the marriage register relating to such marriage; and
 - (ii) to be certified as such a duplicate original or such a copy by the person having the custody of such marriage register or by a registrar of marriages;
- (b) if there is produced at such proceedings, in any case in which the marriage is alleged

to have been solemnized outside the Republic, a document which purports—

- (i) to be an extract from a marriage register kept according to law in the country where the marriage is alleged to have been solemnized; and
- (ii) to be certified as such an extract by the person having custody of such register, if the signature of such person on the certificate is authenticated in accordance with any law of the Republic governing the authentication of documents executed outside the Republic.

(3) At criminal proceedings at which an accused is charged with bigamy, evidence—

- (a) that shortly before the alleged bigamous marriage the accused had been cohabiting with the person to whom he is alleged to be lawfully married;
- (b) that the accused had been treating and recognizing such person as a spouse; and
- (c) of the performance of a marriage ceremony between the accused and such person,

shall, as soon as the alleged bigamous marriage, wherever solemnized, has been proved, be *prima facie* proof that there was a lawful and binding marriage subsisting between the accused and such person at the time of the solemnization of the alleged bigamous marriage.

238. Evidence of relationship on charge of incest.—(1) At criminal proceedings at which an accused is charged with incest—

- (a) it shall be sufficient to prove that the woman or girl on whom or by whom the offence is alleged to have been committed, is reputed to be the lineal ascendant or descendant or the sister, stepmother or stepdaughter of the other party to the incest;
- (b) the accused shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him and the other party to the incest.

(2) Whenever the fact that any lawful and binding marriage was contracted is relevant to the issue at criminal proceedings at which an accused is charged with incest, such fact may be proved *prima facie* in the manner provided in section 237 for the proof of the existence of a lawful and binding marriage of a person charged with bigamy.

239. Evidence on charge of infanticide or concealment of birth.—(1) At criminal proceedings at which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.

(2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth.

240. Evidence on charge of receiving stolen property.—(1) At criminal proceedings at which an accused is charged with receiving stolen property which he knew to be stolen property, evidence may be given at any stage of the proceedings that the accused was, within the period of twelve months immediately preceding the date on which he first appeared in a magistrate's court in respect of such charge, found in possession of other stolen property: Provided that no such evidence shall be given against the accused unless at least three days' notice in writing has been given to him that it is intended to adduce such evidence against him.

(2) The evidence referred to in subsection (1) may be taken into consideration for the purpose of proving that the accused knew that the property which forms the subject of the charge was stolen

property.

(3) Where the accused is proved to have received the property which is the subject of the charge, from a person under the age of eighteen years, he shall be presumed to have known at the time when he received such property that it was stolen property, unless it is proved—

- (a) that the accused was at that time under the age of twenty-one years; or
- (b) that the accused had good cause, other than the mere statement of the person from whom he received such property, to believe, and that he did believe, that such person had the right to dispose of such property.

241. Evidence of previous conviction on charge of receiving stolen property.—If at criminal proceedings at which an accused is charged with receiving stolen property which he knew to be stolen property, it is proved that such property was found in the possession of the accused, evidence may at any stage of the proceedings be given that the accused was, within the five years immediately preceding the date on which he first appeared in a magistrate's court in respect of such charge, convicted of an offence involving fraud or dishonesty, and such evidence may be taken into consideration for the purpose of proving that the accused knew that the property found in his possession was stolen property: Provided that not less than three days' notice in writing shall be given to the accused that it is intended to adduce evidence of such previous conviction.

242. Evidence on charge of defamation.—If at criminal proceedings at which an accused is charged with the unlawful publication of defamatory matter which is contained in a periodical, it is proved that such periodical or the part in which such defamatory matter is contained, was published by the accused, other writings or prints purporting to be other numbers or parts of the same periodical, previously or subsequently published, and containing a printed statement that they were published by or for the accused, shall be admissible in evidence without further proof of their publication.

243. Evidence of receipt of money or property and general deficiency on charge of theft.—(1) At criminal proceedings at which an accused is charged with theft—

- (a) while employed in any capacity in the service of the State, of money or of property which belonged to the State or which came into the possession of the accused by virtue of his employment;
- (b) while a clerk, servant or agent, of money or of property which belonged to his employer or principal or which came into the possession of the accused on account of his employer or principal,

an entry in any book of account kept by the accused or kept under or subject to his charge or supervision, and which purports to be an entry of the receipt of money or of property, shall be proof that such money or such property was received by the accused.

(2) It shall not be necessary at proceedings referred to in subsection (1) to prove the theft by the accused of a specific sum of money or of specific goods, if

- (a) on the examination of the books of account kept or the entries made by the accused or under or subject to this charge or supervision, there is proof of a general deficiency; and
- (b) the court is satisfied that the accused stole the money or goods so deficient or any part thereof.

244. Evidence on charge relating to seals and stamps.—At criminal proceedings at which an accused is charged with any offence relating to any seal or stamp used for the purposes of the public revenue or of the post office in any foreign country, a despatch purporting to be from the officer

administering the government of such country and transmitting to the State President any stamp, mark or impression and stating it to be a genuine stamp, mark or impression of a die-plate or other instrument provided or made or used by or under the direction of the proper authority of such country for the purpose of denoting stamp duty or postal charge, shall on its mere production at such proceedings be *prima facie* proof of the facts stated in the despatch.

245. Evidence on charge of which false representation is element.—If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.

246. Presumptions relating to certain documents.—Any document, including any book, pamphlet, letter, circular letter, list, record, placard or poster, which was at any time on premises occupied by any association of persons, incorporated or unincorporated, or in the possession or under the control of any office-bearer, officer or member of such association, and—

- (a) on the face whereof a person of a name corresponding to that of an accused person appears to be a member or an office-bearer of such association, shall, upon the mere production thereof by the prosecution at criminal proceedings, be *prima facie* proof that the accused is a member or an office-bearer of such association, as the case may be;
- (b) on the face whereof a person of a name corresponding to that of an accused person who is or was a member of such association, appears to be the author of such document, shall, upon the mere production thereof by the prosecution at criminal proceedings, be *prima facie* proof that the accused is the author thereof;
- (c) which on the face thereof appears to be the minutes or a copy of or an extract from the minutes of a meeting of such association or of any committee thereof, shall, upon the mere production thereof by the prosecution at criminal proceedings, be *prima facie* proof of the holding of such meeting and of the proceedings thereat;
- (d) which on the face thereof discloses any object of such association, shall, upon the mere production thereof by the prosecution at criminal proceedings, be *prima facie* proof that the said object is an object of such association.

247. Presumptions relating to absence from Republic of certain persons.—Any document, including any newspaper, periodical, book, pamphlet, letter, circular letter, list, record, placard or poster, on the face whereof it appears that a person of a name corresponding to that of an accused person has at any particular time been outside the Republic or has at any particular time made any statement outside the Republic, shall, upon the mere production thereof by the prosecution at criminal proceedings, be *prima facie* proof that the accused was outside the Republic at such time or, as the case may be, that the accused made such statement outside the Republic at such time, if such document is accompanied by a certificate, purporting to have been signed by the Secretary for Foreign Affairs, to the effect that he is satisfied that such document is of foreign origin.

248. Presumption that accused possessed particular qualification or acted in particular capacity.—(1) If an act or an omission constitutes an offence only when committed by a person possessing a particular qualification or quality, or vested with a particular authority or acting in a particular capacity, an accused charged with such an offence upon a charge alleging that he possessed such qualification or quality or was vested with such authority or was acting in such capacity, shall, at criminal proceedings, be deemed to have possessed such qualification or quality or to have been vested with such authority or to have been acting in such capacity at the time of the commission of the offence, unless such allegation is at any time during the criminal proceedings expressly denied by the

accused or is disproved.

(2) If such allegation is denied or evidence is led to disprove it after the prosecution has closed its case, the prosecution may adduce any evidence and submit any argument in support of the allegation as if it had not closed its case.

249. Presumption of failure to pay tax or to furnish information relating to tax.— When an accused is at criminal proceedings charged with any offence of which the failure to pay any tax or impost to the State, or of which the failure to furnish to any officer of the State any information relating to any tax or impost which is or may be due to the State is an element, the accused shall be deemed to have failed to pay such tax or impost or to furnish such information, unless the contrary is proved.

250. Presumption of lack of authority.—(1) If a person would commit an offence if he—

- (a) carried on any occupation or business;
- (b) performed any act;
- (c) owned or had in his possession or custody or used any article; or
- (d) was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the “necessary authority”), an accused shall, at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.

(2) (a) Any peace officer and, where any fee payable for the necessary authority would accrue to the National Revenue Fund or the Railway and Harbour Fund or a provincial revenue fund, any person authorized thereto in writing by the head of the relevant department or sub-department or by the officer in charge of the relevant office, may demand the production from a person referred to in subsection (1) of the necessary authority which is appropriate.

[Para. (a) amended by s. 1 of Act No. 49 of 1996 and by s. 4 of Act No. 18 of 1996.]

Wording of Sections

(b) Any peace officer, other than a police official in uniform, and any person authorized under paragraph (a) shall, when demanding the necessary authority from any person, produce at the request of that person, his authority to make the demand.

(3) Any person who is the holder of the necessary authority and who fails without reasonable cause to produce forthwith such authority to the person making the demand under subsection (2) for the production thereof, or who fails without reasonable cause to submit such authority to a person and at a place and within such reasonable time as the person making the demand may specify, shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Sub-s. (3) substituted by s. 15 of Act No. 33 of 1986.]

Wording of Sections

251. Unstamped instrument admissible in criminal proceedings.—An instrument liable to stamp duty shall not be held inadmissible at criminal proceedings on the ground only that it is not stamped as required by law.

252. The law in cases not provided for.—The law as to the admissibility of evidence which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law.

252A. Authority to make use of traps and undercover operations and admissibility of evidence so obtained.—(1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

- (a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general were adhered to;
- (b) the nature of the offence under investigation, including—
 - (i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;
 - (ii) the prevalence of the offence in the area concerned; and
 - (iii) the seriousness of such offence;
- (c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;
- (d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;
- (e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;
- (f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;
- (g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;
- (h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;
- (i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;
- (j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;
- (k) any threats, implied or expressed, by the official or his or her agent against the accused;

- (l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;
- (m) whether the official or his or her agent acted in good or bad faith; or
- (n) any other factor which in the opinion of the court has a bearing on the question.

(3) (a) If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

- (i) The nature and seriousness of the offence, including—
 - (aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;
 - (bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;
 - (cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or
 - (dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;
- (ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to—
 - (aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;
 - (bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or
 - (cc) the prejudice to the accused resulting from any improper or unfair conduct;
- (iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;
- (iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and
- (v) any other factor which in the opinion of the court ought to be taken into account.

(4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.

(5) (a) An official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an

offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith.

(b) No prosecution for an offence contemplated in paragraph (a) shall be instituted against an official or his or her agent without the written authority of the attorney-general.

(6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.

(7) The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute.

[S. 252A inserted by s. 1 of Act No. 85 of 1996.]

253. Saving of special provisions in other laws.—No provision of this Chapter shall be construed as modifying any provision of any other law whereby in any criminal proceedings referred to in such law certain specified facts and circumstances are deemed to be evidence or a particular fact or circumstance may be proved in a manner specified therein.

CHAPTER 25 CONVERSION OF TRIAL INTO ENQUIRY

254. Court may refer juvenile accused to children's court.—(1) If it appears to the court at the trial upon any charge of any accused under the age of eighteen years that he is a child as referred to in section 14 (4) of the Child Care Act, 1983 (Act 74 of 1983), and that it is desirable to deal with him in terms of sections 13, 14 and 15 of that Act, it may stop the trial and order that the accused be brought before a children's court mentioned in section 5 of that Act and that he be dealt with under the said sections 13, 14 and 15.

[Sub-s. (1) substituted by s. 8 of Act No. 26 of 1987.]

Wording of Sections

(2) If the order under subsection (1) is made after conviction, the verdict shall be of no force in relation to the person in respect of whom the order is made and shall be deemed not to have been returned.

255. Court may order enquiry under Prevention and Treatment of Drug Dependency Act, 1992.—(1) (a) If in any court during the trial of a person who is charged with an offence, other than an offence referred to in section 18, it appears to the judge or judicial officer presiding at the trial that such person is probably a person as is described in section 21 (1) of the Prevention and Treatment of Drug Dependency Act, 1992 (in this section referred to as the said Act), the judge or judicial officer, may, with the consent of the prosecutor given after consultation with a social worker as defined in section 1 of the said Act, stop the trial and order that an enquiry be held in terms of section 22 of the said Act in respect of the person concerned by a magistrate as defined in section 1 of the said Act and indicated in the order.

[Para. (a) substituted by s. 32 of Act No. 105 of 1997.]

Wording of Sections

(b) The prosecutor shall not give his consent in terms of paragraph (a) if the person concerned is a person in respect of whom the imposition of punishment of imprisonment would be compulsory if he were convicted at such trial.

(2) (a) If the person concerned is in custody he shall for all purposes be deemed to have been arrested in terms of a warrant issued under section 21 (1) of the said Act and shall as soon as practicable be brought before the said magistrate.

(b) If the person concerned is not in custody the said judge or judicial officer shall determine the time when and the place where the person concerned shall appear before the said magistrate, and he shall thereafter for all purposes be deemed to have been summoned in terms of section 21 (1) of the said Act to appear before the said magistrate at the time and place so determined.

(3) As soon as possible after an order has been made under subsection (1) of this section, a prosecutor attached to the court of the said magistrate shall obtain a report as is mentioned in section 21 (2) of the said Act.

(4) The provisions of the said Act shall *mutatis mutandis* apply in respect of a person who appears before a magistrate, as defined in section 1 of the said Act, in pursuance of an order made under subsection (1) of this section as if he were a person brought before the said magistrate in terms of section 21 (1) of the said Act and as if the report obtained in terms of subsection (3) of this section were a report obtained in terms of section 21 (2) of the said Act.

(5) If an order is made under subsection (1) in the course of a trial, whether before or after conviction, and a magistrate under the said Act orders that the person concerned be detained in a treatment centre or registered treatment centre, the proceedings at the trial shall be null and void in so far as such person is concerned.

(6) A copy of the record of the proceedings at the trial, certified or purporting to be certified by the registrar or clerk of the court or other officer having custody of the record of such proceedings or by the deputy of such registrar, clerk or other officer or, in the case where the proceedings were taken down in shorthand or by mechanical means, by the person who transcribed the proceedings, as a true copy of such record, may be produced at the said enquiry as evidence.

[S. 255 substituted by s. 50 of Act No. 20 of 1992.]

Wording of Sections

CHAPTER 26 COMPETENT VERDICTS

256. Attempt.—If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.

257. Accessory after the fact.—If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court: Provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory.

[S. 257 amended by s. 33 of Act No. 105 of 1997.]

Wording of Sections

258. Murder and attempted murder.—If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but—

- (a) the offence of culpable homicide;
- (b) the offence of assault with intent to do grievous bodily harm;
- (c) the offence of robbery;
- (d) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;
- (e) the offence of common assault;
- (f) the offence of public violence; or
- (g) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

259. Culpable homicide.—If the evidence on a charge of culpable homicide does not prove the offence of culpable homicide, but—

- (a) the offence of assault with intent to do grievous bodily harm;
- (b) the offence of robbery;
- (c) in the case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;
- (d) the offence of common assault;
- (e) the offence of public violence; or
- (f) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

260. Robbery.—If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but—

- (a) the offence of assault with intent to do grievous bodily harm;
- (b) the offence of common assault;
- (c) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law;
- (d) the offence of theft;
- (e) the offence of receiving stolen property knowing it to have been stolen; or
- (f) an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955),
- (g)

[Para. (g) deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences.

261. Rape and indecent assault.—(1) If the evidence on a charge of rape or attempted rape does not prove the offence of rape or, as the case may be, attempted rape, but—

- (a) the offence of assault with intent to do grievous bodily harm;
- (b) the offence of indecent assault;
- (c) the offence of common assault;
- (d) the offence of incest;
- (e) the statutory offence of—
 - (i) unlawful carnal intercourse with a girl under a specified age;
 - (ii) committing an immoral or indecent act with such a girl; or
 - (iii) soliciting or enticing such a girl to the commission of an immoral or indecent act;
- (f) the statutory offence of—
 - (i) unlawful carnal intercourse with a female idiot or imbecile;
 - (ii) committing an immoral or indecent act with such a female; or
 - (iii) soliciting or enticing such a female to the commission of an immoral or indecent act,
- (g) and (h)

[Paras. (g) and (h) deleted by s. 6 (a) of Act No. 72 of 1985.]

Wording of Sections

the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of indecent assault does not prove the offence of indecent assault but—

- (a) the offence of common assault;
- (b) the statutory offence of—
 - (i) committing an immoral or indecent act with a girl or a boy under a specified age;
or
 - (ii) soliciting or enticing such a girl or boy to the commission of an immoral or indecent act;
- (c) the statutory offence of—
 - (i) attempting to have unlawful carnal intercourse with a female idiot or imbecile; or
 - (ii) committing an immoral or indecent act with such a female,
- (d) and (e)

[Paras. (d) and (e) deleted by s. 6 (b) of Act No. 72 of 1985.]

Wording of Sections

the accused may be found guilty of the offence so proved.

(3)

[Sub-s. (3) deleted by s. 6 (c) of Act No. 72 of 1985.]

Wording of Sections

262. Housebreaking with intent to commit an offence.—(1) If the evidence on a charge of

housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of house-breaking with intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

[Sub-s. (1) substituted by s. 6 of Act No. 64 of 1982.]

Wording of Sections

(2) If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

[Sub-s. (2) substituted by s. 5 (a) of Act No. 4 of 1992.]

Wording of Sections

(3) If the evidence on a charge of attempted housebreaking with intent to commit an offence specified in the charge, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of attempted housebreaking with intent to commit the offence so specified, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

[Sub-s. (3) added by s. 5 (b) of Act No. 4 of 1992.]

263. Statutory offence of breaking and entering or of entering premises.—(1) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence specified in the charge, does not prove the offence of breaking and entering or of entering the premises with intent to commit the offence so specified but the offence of breaking and entering or of entering the premises with intent to commit an offence other than the offence so specified or of breaking and entering the premises with intent to commit an offence unknown, the accused may be found guilty—

- (a) of the offence so proved; or
- (b) where it is a statutory offence within the province in question to be in or upon any dwelling, premises or enclosed area between sunset and sunrise without lawful excuse, of such offence, if such be the facts proved.

(2) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence to the prosecutor unknown, does not prove the offence of breaking and entering or of entering the premises with intent to commit an offence to the prosecutor unknown but the offence of breaking and entering or of entering the premises with intent to commit a specific offence, the accused may be found guilty of the offence so proved.

264. Theft.—(1) If the evidence on a charge of theft does not prove the offence of theft, but—

- (a) the offence of receiving stolen property knowing it to have been stolen;
- (b) an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955); or
- (c) an offence under section 1 of the General Law Amendment Act, 1956 (Act 50 of 1956),
- (d)

[Para. (d) deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

the accused may be found guilty of the offence so proved.

(2) If a charge of theft alleges that the property referred to therein was stolen on one occasion and the evidence proves that the property was stolen on different occasions, the accused may be convicted of the theft of such property as if it had been stolen on that one occasion.

265. Receiving stolen property knowing it to have been stolen.—If the evidence on a charge of receiving stolen property knowing it to have been stolen does not prove that offence, but—

- (a) the offence of theft; or
- (b) an offence under section 37 of the General Law Amendment Act, 1955 (Act 62 of 1955),
- (c)

[Para. (c) deleted by s. 1 of Act No. 49 of 1996.]

Wording of Sections

the accused may be found guilty of the offence so proved.

266. Assault with intent to do grievous bodily harm.—If the evidence on a charge of assault with intent to do grievous bodily harm does not prove the offence of assault with intent to do grievous bodily harm but the offence of—

- (a) common assault;
- (b) indecent assault; or
- (c) pointing a fire-arm, air-gun or air-pistol in contravention of any law,

the accused may be found guilty of the offence so proved.

267. Common assault.—If evidence on a charge of common assault proves the offence of indecent assault, the accused may be found guilty of indecent assault, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence.

268. Statutory unlawful carnal intercourse.—If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but—

- (a) the offence of indecent assault;
- (b) the offence of common assault; or
- (c) the statutory offence of—
 - (i) committing an immoral or indecent act with such other person;
 - (ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;
 - (iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or
 - (iv) conspiring with such other person to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved.

269. Sodomy.—If the evidence on a charge of sodomy or attempted sodomy does not prove the offence of sodomy or, as the case may be, attempted sodomy, but the offence of indecent assault or common assault, the accused may be found guilty of the offence so proved.

269A.^{ooo}If evidence on a charge of an offence under Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, does not prove the offence so charged but proves the offence of—

- (a) theft;
- (b) fraud; or
- (c) extortion,

the accused may be found guilty of the crime or offence so proved.

[S. 269A inserted by s. 36 (1) of Act No. 12 of 2004.]

270. Offences not specified in this Chapter.—If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

CHAPTER 27 PREVIOUS CONVICTIONS

271. Previous convictions may be proved.—(1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1).

(3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted.

(4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

271A. Certain convictions fall away as previous convictions after expiration of 10 years.—Where a court has convicted a person of—

- (a) an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine, and—
 - (i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him to appear before the court in terms of section 297 (3); or
 - (ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or

[Para. (a) amended by s. 6 (a) of Act No. 4 of 1992.]

- (b) any other offence than that for which the punishment may be a period of imprisonment exceeding six months without the option of a fine,

[Para. (b) substituted by s. 6 (b) of Act No. 4 of 1992.]

Wording of Sections

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine.

[S. 271A inserted by s. 12 of Act No. 5 of 1991 and amended by s. 6 (b) of Act No. 4 of 1992.]

Wording of Sections

272. Finger-print record prima facie evidence of conviction.—When a previous conviction may be proved under any provision of this Act, a record, photograph or document which relates to a finger-print and which purports to emanate from the officer commanding the South African Criminal Bureau or, in the case of any other country, from any officer having charge of the criminal records of the country in question, shall, whether or not such record, photograph or document was obtained under any law or against the wish or the will of the person concerned, be admissible in evidence at criminal proceedings upon production thereof by a police official having the custody thereof, and shall be *prima facie* proof of the facts contained therein.

273. Evidence of further particulars relating to previous conviction.—Whenever any court in criminal proceedings requires particulars or further particulars or clarification of any previous conviction admitted by or proved against an accused at such proceedings—

- (a) any telegram purporting to have been sent by the officer commanding the South African Criminal Bureau or by any court within the Republic; or
- (b) any document purporting to be certified as correct by the officer referred to in paragraph (a) or by any registrar or clerk of any court within the Republic or by any officer in charge of any prison within the Republic,

and which purports to furnish such particulars or such clarification, shall, upon the mere production thereof at the relevant proceedings be admissible as *prima facie* proof of the facts contained therein.

CHAPTER 28
SENTENCE

274. Evidence on sentence.—(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

275. Sentence by judicial officer or judge other than judicial officer or judge who convicted accused.—(1) If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if

he or she had not been absent.

(2) Whenever—

- (a) a judge is required to sentence an accused convicted by him or her of any offence; or
- (b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of an accused,

and that judge is for any reason not available, any other judge of the provincial or local division concerned may, after consideration of the evidence recorded and in the presence of the accused, sentence the accused or, as the case may be, take such other steps as the former judge could lawfully have taken in the proceedings in question if he or she had been available.

[S. 275 substituted by s. 7 of Act No. 34 of 1998.]

Wording of Sections

276. Nature of punishments.—(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely—

(a)

[Para. (a) deleted by s. 34 of Act No. 105 of 1997.]

Wording of Sections

(b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);

[Para. (b) substituted by s. 3 of Act No. 107 of 1990 and by s. 20 of Act No. 116 of 1993.]

Wording of Sections

(c) periodical imprisonment;

(d) declaration as an habitual criminal;

(e) committal to any institution established by law;

(f) a fine;

(g)

[Para. (g) deleted by s. 2 of Act No. 33 of 1997.]

Wording of Sections

(h) correctional supervision;

[Para. (h) added by s. 41 (a) of Act No. 122 of 1991.]

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

[Para. (i) added by s. 41 (a) of Act No. 122 of 1991.]

(2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed—

- (a) as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or
- (b) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.

(3) Notwithstanding anything to the contrary in any law contained, the provisions of

subsection (1) shall not be construed as prohibiting the court—

- (a) from imposing imprisonment together with correctional supervision; or
- (b) from imposing the punishment referred to in subsection (1) (h) or (i) in respect of any offence.

[Sub-s. (3) added by s. 41 (b) of Act No. 122 of 1991 and substituted by s. 18 (1) of Act No. 139 of 1992.]

Wording of Sections

276A. Imposition of correctional supervision, and conversion of imprisonment into correctional supervision and *vice versa*.—(1) Punishment shall only be imposed under section 276 (1) (h)—

- (a) after a report of a probation officer or a correctional official has been placed before the court; and
- (b) for a fixed period not exceeding three years.

(2) Punishment shall only be imposed under section 276 (1) (i)—

- (a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and
- (b) for a fixed period not exceeding five years.

(3) (a) Where a person has been sentenced by a court to imprisonment for a period—

- (i) not exceeding five years; or
- (ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the regulations made thereunder is not more than five years in the future,

the Commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court *a quo* in order to reconsider the said sentence.

[Para. (a) amended by s. 46 (a) of Act No. 129 of 1993.]

Wording of Sections

(b) On receipt of any application referred to in paragraph (a) the clerk or registrar of the court, as the case may be, shall, after consultation with the prosecutor, set the matter down for a specific date on the roll of the court concerned.

[Para. (b) substituted by s. 46 (b) of Act No. 129 of 1993.]

Wording of Sections

(c) The clerk or registrar of the court, as the case may be, shall for purposes of the reconsideration of the sentence in accordance with this subsection—

- (i) within a reasonable time before the date referred to in paragraph (b) submit the case record to the judicial officer who imposed the sentence or, if he is not available, another judicial officer of the same court: Provided that if the evidence in the case has been recorded by mechanical means, only such parts of the record as may be indicated as necessary by such a judicial officer, shall be transcribed for the purposes of this subsection;
- (ii) inform the Commissioner in writing of the date for which the matter has been set down on the roll and request him to furnish him with a written motivated recommendation before that date for submission to the judicial officer; and

- (iii) submit any recommendation referred to in subparagraph (ii) to that judicial officer.

[Para. (c) amended by s. 46 (c) of Act No. 129 of 1993.]

Wording of Sections

(d) Whenever a court reconsiders a sentence in terms of this subsection, it shall have the same powers as if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that if the person concerned concurs thereto in writing, the proceedings contemplated in this subsection may be concluded in his absence: Provided further that he may nevertheless be represented at such proceedings or cause to submit written representations to the court.

(e) After a court has reconsidered a sentence in terms of this subsection, it may—

- (i) confirm the sentence or order of the court *a quo*;
- (ii) convert the sentence into correctional supervision on the conditions it may deem fit; or
- (iii) impose any other proper sentence:

Provided that the last-mentioned sentence, if imprisonment, shall not exceed the period of the unexpired portion of imprisonment still to be served at that point.

(4) (a) A court, whether constituted differently or not, which has imposed a punishment referred to in subsection (1) or (2) on a person or has converted his sentence under subsection (3) (e) (ii), may at any time, if it is found from a motivated recommendation by a probation officer or the Commissioner that that person is not fit to be subject to correctional supervision or to serve the imposed punishment, reconsider that punishment and impose any other proper punishment.

(b) The procedure referred to in subsection (3) shall apply *mutatis mutandis* to the reconsideration of any punishment under this subsection.

[S. 276A inserted by s. 42 of Act No. 122 of 1991.]

277.

[S. 277 substituted by s. 4 of Act No. 107 of 1990 and repealed by s. 35 of Act No. 105 of 1997.]

Wording of Sections

278.

[S. 278 repealed by s. 35 of Act No. 105 of 1997.]

Wording of Sections

279.

[S. 279 amended by s. 5 of Act No. 107 of 1990 and by s. 4 of Act No. 18 of 1996 and repealed by s. 35 of Act No. 105 of 1997.]

Wording of Sections

280. Cumulative or concurrent sentences.—(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[Sub-s. (2) substituted by s. 47 (a) of Act No. 129 of 1993.]

(3) Such punishments, when consisting of correctional supervision referred to in section 276 (1) (h), shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments of correctional supervision shall run concurrently: Provided that if such punishments in the aggregate exceed a period of three years, a period of not more than three years from the date on which the first of the said punishments has commenced shall be served, unless the court, when imposing sentence, otherwise directs.

[Sub-s. (3) added by s. 47 (b) of Act No. 129 of 1993.]

281. Interpretation of certain provisions in laws relating to imprisonment and fines.—In construing any provision of any law (not being an Act of Parliament passed on or after the first day of September, 1959, or anything enacted by virtue of powers conferred by such an Act), in so far as it prescribes or confers the powers to prescribe a punishment for any offence, any reference in that law—

- (a) to imprisonment with or without any form of labour, shall be construed as a reference to imprisonment only;
- (b) to any period of imprisonment of less than three months which may not be exceeded in imposing or prescribing a sentence of imprisonment, shall be construed as a reference to a period of imprisonment of three months;
- (c) to any fine of less than fifty rand which may not be exceeded in imposing or prescribing a fine, shall be construed as a reference to a fine of fifty rand.

282. Antedating sentence of imprisonment.—Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.

[S. 282 substituted by s. 13 of Act No. 5 of 1991, amended by s. 48 of Act No. 129 of 1993 and substituted by s. 36 of Act No. 105 of 1997.]

283. Discretion of court as to punishment.—(1) A person liable to a sentence of imprisonment for life or for any period, may be sentenced to imprisonment for any shorter period, and a person liable to a sentence of a fine of any amount may be sentenced to a fine of any lesser amount.

(2) The provision of subsection (1) shall not apply with reference to any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty therefor.

284. Minimum period of imprisonment four days.—No person shall be sentenced by any court to imprisonment for a period of less than four days unless the sentence is that the person concerned be detained until the rising of the court.

285. Periodical imprisonment.—(1) A court convicting a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, may, in lieu of any other

punishment, sentence such person to undergo in accordance with the laws relating to prisons, periodical imprisonment for a period of not less than one hundred hours and not more than two thousand hours.

(2) (a) The court which imposes a sentence of periodical imprisonment upon any person shall cause to be served upon him a notice in writing directing him to surrender himself on a date and at a time specified in the notice or (if prevented from doing so by circumstances beyond his control) as soon as possible thereafter, to the officer in charge of a place so specified, whether within or outside the area of jurisdiction of the court, for the purpose of undergoing such imprisonment.

(b) The court which tries any person on a charge of contravening subsection (4) (a) shall, subject to subsection (5), cause a notice as contemplated in paragraph (a) to be served on that person.

[Para. (b) added by s. 16 of Act No. 33 of 1986.]

(3) A copy of the said notice shall serve as a warrant for the reception into custody of the convicted person by the said officer.

(4) Any person who—

- (a) without lawful excuse, the proof whereof shall be on such person, fails to comply with a notice issued under subsection (2); or
- (b) when surrendering himself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like; or
- (c) impersonates or falsely represents himself to be a person who has been directed to surrender himself for the purpose of undergoing periodical imprisonment,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

(5) If, before the expiration of any sentence of periodical imprisonment imposed upon any person for any offence, such person is undergoing a punishment of any other form of detention imposed by any court, any magistrate before whom such person is brought, shall set aside the unexpired portion of the sentence of periodical imprisonment and, after considering the evidence recorded in respect of such offence, may impose in lieu of such unexpired portion any punishment within the limits of his jurisdiction and of any punishment prescribed by any law as a punishment for such offence.

286. Declaration of certain persons as habitual criminals.—(1) Subject to the provisions of subsection (2), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.

(2) No person shall be declared an habitual criminal—

- (a) if he is under the age of eighteen years; or
- (b)

[Para. (b) deleted by s. 6 of Act No. 107 of 1990.]

Wording of Sections

- (c) if in the opinion of the court the offence warrants the imposition of punishment which by itself or together with any punishment warranted or required in respect of any other offence of which the accused is simultaneously convicted, would entail imprisonment for a period exceeding 15 years.

[Para. (c) substituted by s. 37 of Act No. 105 of 1997.]

(3) A person declared an habitual criminal shall be dealt with in accordance with the laws relating to prisons.

286A. Declaration of certain persons as dangerous criminals.—(1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal.

(2) (a) If it appears to a court referred to in subsection (1) or if it is alleged before such court that the accused is a dangerous criminal, the court may after conviction direct that the matter be enquired into and be reported on in accordance with the provisions of subsection (3).

(b) Before the court commits an accused for an enquiry in terms of subsection (3), the court shall inform such accused of its intention and explain to him the provisions of this section and of section 286B as well as the gravity of those provisions.

(3) (a) Where a court issues a direction under subsection (2) (a), the relevant enquiry shall be conducted and be reported on—

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; and

(ii) by a psychiatrist appointed by the accused if he so wishes.

(b) (i) The court may for the purposes of such enquiry commit the accused to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and if an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(ii) When the period of committal is extended for the first time under subparagraph (i), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.

(c) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the prosecutor and the accused or his legal representative.

(d) The report shall—

(i) include a description of the nature of the enquiry; and

(ii) include a finding as to the question whether the accused represents a danger to the physical or mental well-being of other persons.

(e) If the persons conducting the enquiry are not unanimous in their finding under paragraph (d) (ii), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.

(f) Subject to the provisions of paragraph (g), the contents of the report shall be admissible in evidence at criminal proceedings.

(g) A statement made by an accused at the enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the question whether the accused is a dangerous criminal or not, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.

(h) A psychiatrist appointed under paragraph (a), other than a psychiatrist appointed by an

accused, shall, subject to the provisions of paragraph (i), be appointed from the list of psychiatrists referred to in section 79 (9).

(i) Where the list compiled and kept in terms of section 79 (9) does not include a sufficient number of psychiatrists who may conveniently be appointed for any enquiry under this subsection, a psychiatrist may be appointed for the purposes of such enquiry notwithstanding that his name does not appear on such list.

(j) A psychiatrist designated or appointed under paragraph (a) and who is not in the full-time service of the State, shall be compensated for his services in connection with the enquiry, including giving evidence, from public funds in accordance with a tariff determined by the Minister in consultation with the Minister of State Expenditure.

(k) For the purposes of this subsection a psychiatrist means a person registered as a psychiatrist under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974).

(4) (a) If the finding contained in the report is the unanimous finding of the persons who under subsection (3) conducted the enquiry, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(b) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under subsection (3) (a) conducted the enquiry.

(c) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under subsection (3) (a) conducted the enquiry.

[S. 286A inserted by s. 21 of Act No. 116 of 1993.]

286B. Imprisonment for indefinite period.—(1) The court which declares a person a dangerous criminal shall—

- (a) sentence such person to undergo imprisonment for an indefinite period; and
- (b) direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.

(2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1) (b) but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1) (b) be brought before the court which sentenced him in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he had not been absent.

(3) (a) The Commissioner may, if he is of the opinion that owing to practical or other considerations it is desirable that a court other than the court which sentenced the person should reconsider such sentence after the expiration of the period contemplated in subsection (1) (b), with the concurrence of the attorney-general in whose jurisdiction such other court is situated, apply to the registrar or to the clerk of the court, as the case may be, of the other court to have such person appear before the other court for that purpose: Provided that such sentence shall only be reconsidered by a court with jurisdiction equal to that of the court which sentenced the person.

(b) On receipt of any application referred to in paragraph (a), the registrar or the clerk of the court, as the case may be, shall, after consultation with the prosecutor, set the matter down for a date which shall not be later than seven days after the expiration of the period contemplated in subsection

(1) (b).

(c) The registrar or the clerk of the court, as the case may be, shall for the purpose of the reconsideration of the sentence—

- (i) within a reasonable time before the date contemplated in paragraph (b) submit the case record to the judicial officer who is to reconsider the sentence; and
- (ii) inform the Commissioner in writing of the date for which the matter has been set down.

(4) (a) Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section 5C of the Correctional Services Act, 1959 (Act No. 8 of 1959).

(b) After a court has considered a sentence in terms of this section, it may—

- (i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;
- (ii) convert the sentence into correctional supervision on the conditions it deems fit; or
- (iii) release the person unconditionally or on such conditions as it deems fit.

(5) A court which has converted the sentence of a person under subsection (4) (b) (ii) may, whether differently constituted or not—

- (a) at any time, if it is found from a motivated recommendation by the Commissioner that that person is not fit to be subject to correctional supervision; or
- (b) after such person has been brought before the court in terms of section 84B of the Correctional Services Act, 1959 (Act No. 8 of 1959),

reconsider that sentence and—

- (i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;
- (ii) release the person unconditionally or on such conditions as it deems fit; or
- (iii) where the person is brought before the court in terms of paragraph (b), again place the person under correctional supervision on the conditions it deems fit and for a period which shall not exceed the unexpired portion of the period of correctional supervision as converted in terms of subsection (4) (b) (ii).

(6) For the purposes of subsection (4) (b) (i) or (5) (i), it shall not be regarded as exceeding the jurisdiction of the regional court if the further period contemplated in those subsections and the period contemplated in subsection (1) (b), together exceed such court's jurisdiction.

(7) At the expiration of the further period contemplated in subsection (4) (b) (i) or (5) (i), the provisions of subsections (2) up to and including (6), as well as of this subsection, shall *mutatis mutandis* apply.

[S. 286B inserted by s. 21 of Act No. 116 of 1993.]

287. Imprisonment in default of payment of fine.—(1) Whenever a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative punishment), it may, in imposing a fine upon such person, impose, as a punishment alternative to such

fine, a sentence of imprisonment of any period within the limits of its jurisdiction: Provided that, subject to the provisions of subsection (3), the period of such alternative sentence of imprisonment shall not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by any law as a punishment (whether direct or alternative) for such offence.

(2) Whenever a court has imposed upon any person a fine without an alternative sentence of imprisonment and the fine is not paid in full or is not recovered in full in terms of section 288, the court which passed sentence on such person (or if that court was a circuit local division of the Supreme Court, then the provincial or local division of the Supreme Court within whose area of jurisdiction such sentence was imposed) may issue a warrant directing that he be arrested and brought before the court, which may thereupon sentence him to such term of imprisonment as could have been imposed upon him as an alternative punishment in terms of subsection (1).

(3) Whenever by any law passed before the date of commencement of the General Law Amendment Act, 1935 (Act 46 of 1935), a court is empowered to impose upon a person convicted by such court of an offence, a sentence of imprisonment (whether direct or as an alternative to a fine) of a duration proportionate to the sum of a fine, that court may, notwithstanding such law, impose upon any person convicted of such offence in lieu of a sentence of imprisonment which is proportionate as aforesaid, any sentence of imprisonment within the limits of the jurisdiction of the court.

(4) Unless the court which has imposed a period of imprisonment as an alternative to a fine has directed otherwise, the Commissioner may in his discretion at the commencement of the alternative punishment or at any point thereafter, if it does not exceed five years—

- (a) act as if the person were sentenced to imprisonment as referred to in section 276 (1) (i); or
- (b) apply in accordance with the provisions of section 276A (3) for the sentence to be reconsidered by the court *a quo*, and thereupon the provisions of section 276A (3) shall apply *mutatis mutandis* to such a case.

[Sub-s. (4) added by s. 43 of Act No. 122 of 1991.]

288. Recovery of fine.—(1) (a) Whenever a person is sentenced to pay a fine, the court passing the sentence may, in its discretion, issue a warrant addressed to the sheriff or messenger of the court authorizing him to levy the amount of the fine by attachment and sale of any movable property belonging to such person although the sentence directs that, in default of payment of the fine, such person shall be imprisoned.

(b) The amount which may be levied shall be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment and sale thereunder.

(2) If the proceeds of the sale of the movable property are insufficient to satisfy the amount of the fine and the costs and expenses aforesaid, a superior court may issue a warrant, or, in the case of a sentence by any lower court, authorize such lower court to issue a warrant for the levy against the immovable property of such person of the amount unpaid.

(3) When a person is sentenced only to a fine or, in default of payment of the fine, imprisonment and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the person upon his executing a bond with or without sureties as the court thinks fit, on condition that he appears before such court or some other court on the day appointed for the return of such warrant, such day being not more than fifteen days from the time of executing the bond, and in the event of the amount of the fine not being recovered, the sentence of imprisonment may be carried into execution forthwith or may be suspended as before for a further period or periods of not more than fifteen days, as the court may deem fit.

(4) In any case in which an order for the payment of money is made on non-recovery whereof

imprisonment may be ordered, and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (3), and in default of his doing so, may at once pass sentence of imprisonment as if the money had not been recovered.

289. Court may enforce payment of fine.—Where a person is sentenced to pay a fine, whether with or without an alternative period of imprisonment, the court may in its discretion, without prejudice to any other power under this Act relating to the payment of a fine, enforce payment of the fine, whether as to the whole or any part thereof—

- (a) by the seizure of money upon the person concerned;
- (b) if money is due or is to become due as salary or wages from any employer of the person concerned—
 - (i) by from time to time ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court in question; or
 - (ii) by ordering such employer to deduct from time to time a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court in question.

290. Manner of dealing with convicted juvenile.—(1) Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence—

- (a) order that he be placed under the supervision of a probation officer or a correctional official; or

[Para. (a) substituted by s. 44 (a) of Act No. 122 of 1991.]

Wording of Sections

- (b) order that he be placed in the custody of any suitable person designated in the order; or
- (c) deal with him both in terms of paragraphs (a) and (b); or
- (d) order that he be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983).

[Para. (d) substituted by s. 9 (a) of Act No. 26 of 1987.]

Wording of Sections

(2) Any court which sentences a person under the age of eighteen years to a fine may, in addition to imposing such punishment, deal with him or her in terms of paragraph (a), (b), (c) or (d) of subsection (1).

[Sub-s. (2) substituted by s. 2 of Act No. 33 of 1997.]

Wording of Sections

(3) Any court in which a person of or over the age of eighteen years but under the age of twenty-one years is convicted of any offence may, instead of imposing punishment upon him for that offence, order that he be placed under the supervision of a probation officer or a correctional official or that he be sent to a reform school as defined in section 1 of the Child Care Act, 1983.

[Sub-s. (3) amended by s. 9 (b) of Act No. 26 of 1987 and substituted by s. 7 of Act No. 107 of 1990 and by s. 44 (b) of Act No. 122 of 1991.]

Wording of Sections

(4) A court which in terms of this section orders that any person be sent to a reform school, may direct that such person be kept in a place of safety as defined in section 1 of the Child Care Act, 1983, until such time as the order can be put into effect.

[Sub-s. (4) substituted by s. 9 (c) of Act No. 26 of 1987.]

Wording of Sections

291. Duration of orders under section 290.—(1) Subject to the provisions of this section, any order made under section 290 shall lapse after the expiration of a period of two years after the date on which the order was made or after the expiration of such shorter period as the court may have determined at the time of making that order or, if the person concerned is discharged in accordance with the provisions of the Child Care Act, 1983 (Act 74 of 1983), at the time of such discharge.

(2) Subject to the provisions of subsection (3), the Minister to whom the administration of the provisions of the said Child Care Act, 1983, has been assigned or any person acting under his authority, may extend the validity of an order referred to in subsection (1) for a further period not exceeding two years at a time: Provided that an order may not be so extended to a date after the date on which the person attains the age of 18 years.

(3) The said Minister or any person acting under his authority, may, if he deems it necessary, order that any former pupil of or pupil in a reform school whose period of detention has expired or is about to expire, shall return to or remain in that reform school for a further period not exceeding two years and may from time to time by further order extend that period: Provided that no such order or extension shall extend the period of detention of any person beyond the end of the year in which that person attains the age of 21 years.

(4)

(5) (a) Where a court has dealt with a person under section 290 (1) or (3) and such a person is later found not fit to be subject to such an order, such person may be dealt with *mutatis mutandis* in accordance with the provisions of section 276A (4).

(b) For the purposes of the provisions of paragraph (a) the expression “a probation officer or the Commissioner” in section 276A (4) shall be construed as the probation officer or correctional official or person concerned, or the person at the head of the reform school concerned or a person authorized by him, as the case may be.

[S. 291 substituted by s. 10 of Act No. 26 of 1987. Sub-s. (5) added by s. 45 of Act No. 122 of 1991.]

Wording of Sections

292.

[S.292 amended by s. 17 of Act No. 33 of 1986 and repealed by s. 2 of Act No. 33 of 1997.]

Wording of Sections

293.

[S. 293 amended by s. 18 of Act No. 33 of 1986 and repealed by s. 2 of Act No. 33 of 1997.]

Wording of Sections

294.

[S. 294 amended by s. 19 of Act No. 33 of 1986 and repealed by s. 2 of Act No. 33 of 1997.]

Wording of Sections

295.

[S. 295 repealed by s. 2 of Act No. 33 of 1997.]

Wording of Sections

296. Committal to treatment centre.—(1) A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such offence, order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992, if the court is satisfied from the evidence or from any other information placed before it, which shall in either of the said cases include the report of a probation officer, that such person is a person as is described in section 21 (1) of the said Act, and such order shall for the purposes of the said Act be deemed to have been made under section 22 thereof: Provided that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

(2) (a) Where a court has referred a person to a treatment centre under subsection (1) and such person is later found not to be fit for treatment in such treatment centre, such person may be dealt with *mutatis mutandis* in accordance with the provisions of section 276A (4).

(b) For the purposes of the provisions of paragraph (a) the expression “a probation officer or the Commissioner” in section 276A (4) shall be construed as the person at the head of the rehabilitation centre or a person authorized by him.

[S. 296 amended by s. 15 of Act No. 56 of 1979, by s. 7 of Act No. 64 of 1982, by s. 11 of Act No. 26 of 1987 and by s. 46 of Act No. 122 of 1991, substituted by s. 51 of Act No. 20 of 1992.]

Wording of Sections

297. Conditional or unconditional postponement or suspension of sentence, and caution or reprimand.—(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion—

- (a) postpone for a period not exceeding five years the passing of sentence and release the person concerned—
 - (i) on one or more conditions, whether as to—
 - (aa) compensation;
 - (bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
 - (cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

[Item (cc) substituted by s. 20 (a) of Act No. 33 of 1986.]

Wording of Sections

- (ccA) submission to correctional supervision;
[Item (ccA) inserted by s. 47 of Act No. 122 of 1991.]

- (dd) submission to instruction or treatment;
- (ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act No. 116 of 1991);
[Item (ee) amended by s. 4 of Act No. 18 of 1996.]

Wording of Sections

- (ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or

(ii) unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order; or

(c) discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(1A) A condition relating to the performance of community service shall only be imposed—

(a) if the person concerned is 15 years or older; and

(b) for the performance of that service for a period of not less than 50 hours.

[Sub-s. (1A) inserted by s. 20 (b) of Act No. 33 of 1986.]

(2) Where a court has under paragraph (a) (i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(3) Where a court has under paragraph (a) (ii) of subsection (1) unconditionally postponed the passing of sentence, and the person concerned has not at the expiration of the relevant period been called upon to appear before the court, such person shall be deemed to have been discharged with a caution under subsection (1) (c).

(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) of subsection (1).

(5) Where a court imposes a fine, the court may suspend the payment thereof—

(a) until the expiration of a period not exceeding five years; or

(b) on condition that the fine is paid over a period not exceeding five years in instalments and at intervals determined by the court.

(6) (a) A court which sentences a person to a term of imprisonment as an alternative to a fine or, if the court which has imposed such sentence was a regional court or a magistrate's court, a magistrate, may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, suspend the operation of the sentence and order the release of the person concerned on such conditions relating to the payment of the fine or such portion thereof as may still be due, as to the court or, in the case of a sentence imposed by a regional court or magistrate's court, the magistrate, may seem expedient, including a condition that the person concerned take up a specified employment and that the fine due be paid in instalments by the person concerned or his employer: Provided that the power conferred by this subsection shall not be exercised by a magistrate where the court which has imposed the sentence has so ordered.

(b) A court which has suspended a sentence under paragraph (a), whether differently

constituted or not, or any court of equal or superior jurisdiction, or a magistrate who has suspended a sentence in terms of paragraph (a), may at any time—

- (i) further suspend the operation of the sentence on any existing or additional conditions which to the court or magistrate may seem expedient; or
- (ii) cancel the order of suspension and recommit the person concerned to serve the balance of the sentence.

[Sub-s. (6) substituted by s. 21 of Act No. 59 of 1983.]

Wording of Sections

(7) A court which has—

- (a) postponed the passing of sentence under paragraph (a) (i) of subsection (1);
- (b) suspended the operation of a sentence under subsection (1) (b) or (4); or
- (c) suspended the payment of a fine under subsection (5),

whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.

(8) A court which has—

- (a) postponed the passing of sentence under paragraph (a) (i) of subsection (1); or
- (b) suspended the operation of a sentence under subsection (1) (b) or under subsection (4),

on condition that the person concerned perform community service or that he submit himself to instruction or treatment or to the supervision or control of a probation officer or that he attend or reside at a specified centre for a specified purpose, may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation, as the case may be.

[Sub-s. (8) amended by s. 20 (c) of Act No. 33 of 1986.]

Wording of Sections

(8A) (a) A court which under this section has imposed a condition according to which the person concerned is required to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, shall cause to be served upon the person concerned a notice in writing directing him to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or to reside thereat, as the case may be.

(b) A copy of the said notice shall serve as authority to the person mentioned therein to have that community service performed by the person concerned or to provide that instruction or treatment to the person concerned or to allow the person concerned to attend that centre or to reside thereat.

[Sub-s. (8A) inserted by s. 20 (d) of Act No. 33 of 1986.]

(8B) Any person who—

- (a) when he reports to perform community service, to undergo instruction or treatment or

to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or

- (b) impersonates or falsely represents himself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

[Sub-s. (8B) inserted by s. 20 (d) of Act No. 33 of 1986.]

(9) (a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question—

- (i) was imposed under paragraph (a) (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or
- (ii) was imposed under subsection (1) (b), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence, which may, where the person concerned is under the age of twenty-one years, include an order under the provisions of section 290, or, in the case of subparagraph (ii), put into operation the sentence which was suspended.

[Para. (a) amended by s. 49 of Act No. 129 of 1993.]

Wording of Sections

(b) A person who has been called upon under paragraph (a) (ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.

297A. Liability for patrimonial loss arising from performance of community service.—(1) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him in the performance of community service in terms of section 297, that loss may, subject to subsection (3), be recovered from the State.

(2) Subsection (1) shall not be construed as precluding the State from obtaining indemnification against its liability in terms of subsection (1) by means of insurance or otherwise.

(3) The patrimonial loss which may be recovered from the State in terms of subsection (1) shall be reduced by the amount from any other source to which the injured person is entitled by reason of the patrimonial loss suffered by him.

(4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured person against the accused shall pass to the State.

(5) If any person as a result of the performance of community service in terms of section 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-general: Justice may, with the concurrence of the Treasury, as an act of grace pay such

amount as he may deem reasonable to that person.

[S. 297A inserted by s. 21 of Act No. 33 of 1986.]

297B. Agreement on operation of suspended sentences.—(1) The State President may, on such conditions as he may deem necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of the Republic or of such state, of an offence mentioned in the agreement.

(2) The State President may, if the parties agree, amend such an agreement to the extent which he deems necessary.

(3) If an application is made for a suspended sentence, imposed by a court of a state referred to in subsection (1), to be put into operation, the court at which the application is made shall, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in the Republic.

(4) (a) An agreement referred to in subsection (1), or any amendment thereof, shall only be in force after it has been published by the State President by proclamation in the *Gazette*.

(b) The State President may at any time and in like manner withdraw any such agreement.

[S. 297B, previously s. 297A, inserted by s. 1 of Act No. 8 of 1989 and amended by s. 6 of Act No. 77 of 1989.]

Wording of Sections

298. Sentence may be corrected.—When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.

299. Warrant for the execution of sentence.—A warrant for the execution of any sentence may be issued by the judge or judicial officer who passed the sentence or by any other judge or judicial officer of the court in question, or, in the case of a regional court, by any magistrate, and such warrant shall commit the person concerned to the prison for the magisterial district in which such person is sentenced.

CHAPTER 29 COMPENSATION AND RESTITUTION

300. Court may award compensation where offence causes damage to or loss of property.—(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that—

(a) a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the *Gazette* in respect of the respective courts.

[Para. (a) substituted by s. 16 of Act No. 56 of 1979, by s. 7 of Act No. 109 of 1984 and by s. 14 of Act No. 5 of 1991.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

(b)

[Para. (b) deleted by s. 12 of Act No. 26 of 1987.]

Wording of Sections

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

(3) (a) An award made under this section—

- (i) by a magistrate's court, shall have the effect of a civil judgment of that court;
- (ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

(b) Where a superior court makes an award under this section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate's court.

(4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5) (a) A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subsection (4).

(b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made.

301. Compensation to innocent purchaser of property unlawfully obtained.—Where a person is convicted of theft or of any other offence whereby he has unlawfully obtained any property, and it appears to the court on the evidence that such person sold such property or part thereof to another person who had no knowledge that the property was stolen or unlawfully obtained, the court may, on the application of such purchaser and on restitution of such property to the owner thereof, order that, out of any money of such convicted person taken from him on his arrest, a sum not exceeding the amount paid by the purchaser be returned to him.

CHAPTER 30

REVIEWS AND APPEALS IN CASES OF CRIMINAL PROCEEDINGS IN LOWER COURTS

302. Sentences subject to review in the ordinary course.—(1) (a) Any sentence imposed by a magistrate's court—

- (i) which, in the case of imprisonment (including detention in a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

[Sub-para. (i) substituted by s. 13 (a) of Act No. 26 of 1987.]

Wording of Sections

- (ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the *Gazette* for the respective judicial officers referred to in subparagraph (i),

[Sub-para. (ii) substituted by s. 8 of Act No. 109 of 1984 and by s. 15 of Act No. 5 of 1991.]

Wording of Sections

[General Note: Amount determined in Government Notice No. R.239 in *Government Gazette* 24393 of 14 February, 2003.]

- (iii)

[Sub-para. (iii) deleted by s. 2 of Act No. 33 of 1997.]

Wording of Sections

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.

[Para. (a) amended by s. 11 of Act No. 105 of 1982.]

Wording of Sections

- (b) The provisions of paragraph (a) shall—

- (i) be suspended in respect of an accused referred to in the first proviso to section 309 (1) (a) who has duly noted an appeal in terms of section 309 (2) against a conviction or sentence and has not abandoned the appeal;
- (ii) be suspended in respect of an accused who has duly noted an appeal in terms of section 309 (2) against a conviction or sentence, after being granted leave to appeal in terms of section 309B or 309C, and has not abandoned the appeal; and
- (iii) cease to apply in respect of an accused when judgment in the appeal is given.

[Para. (b) substituted by s. 1 of Act No. 42 of 2003.]

Wording of Sections

- (2) For the purposes of subsection (1)—

- (a) each sentence on a separate charge shall be regarded as a separate sentence, and the fact that the aggregate of sentences imposed on an accused in respect of more than one charge in the same proceedings exceeds the periods or amounts referred to in that subsection, shall not render those sentences subject to review in the ordinary course.

- (b)

[Para. (b) deleted by s. 22 of Act No. 59 of 1983.]

Wording of Sections

- (3) The provisions of subsection (1) shall only apply—

- (a) with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser.

- (b)

[Para. (b) deleted by s. 13 (b) of Act No. 26 of 1987.]

Wording of Sections

303. Transmission of record.—The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302 (1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish

to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration.

[S. 303 amended by s. 12 of Act No. 105 of 1982.]

Wording of Sections

304. Procedure on review.—(1) If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate's court in question, it appears to the judge that the proceedings are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate's court in question.

(2) (a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the provincial or local division having jurisdiction, the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.

[Para. (a) amended by s. 13 of Act No. 105 of 1982.]

Wording of Sections

(b) Such court may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312—

- (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
- (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;
- (iii) set aside or correct the proceedings of the magistrate's court;
- (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
- (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and

[Sub-para. (v) amended by s. 13 of Act No. 105 of 1982.]

Wording of Sections

- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.

(3) If the court desires to have a question of law or of fact arising in any case argued, it may direct such question to be argued by the attorney-general and by such counsel as the court may

appoint.

(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.

[Sub-s. (4) amended by s. 13 of Act No. 105 of 1982.]

Wording of Sections

304A. Review of proceedings before sentence.—(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.

(b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.

[S. 304A inserted by s. 22 of Act No. 33 of 1986.]

305.

[S. 305 amended by s. 14 of Act No. 105 of 1982 and repealed by s. 1 of Act No. 76 of 1997.]

Wording of Sections

306. Accused may set down case for argument.—(1) A magistrate's court imposing sentence which under section 302 is subject to review, shall forthwith inform the person convicted that the record of the proceedings will be transmitted within one week, and such person may then inspect and make a copy of such record before transmission or whilst in the possession of the provincial or local division, and may set down the case for argument before the provincial or local division having jurisdiction in like manner as if the record had been returned or transmitted to such provincial or local division in compliance with any order made by it for the purpose of bringing in review the proceedings of a magistrate's court.

[Sub-s. (1) amended by s. 15 of Act No. 105 of 1982.]

Wording of Sections

(2) Whenever a case is so set down, whether the offence in question was prosecuted at the instance of the State or at the instance of a private prosecutor, a written notice shall be served, by or on behalf of the person convicted, upon the attorney-general at his office not less than seven days before the day appointed for the argument, setting forth the name and number of the case, the court before which it was tried, the date for which the case has been set down for argument and the grounds or reasons upon which the judgment is sought to be reversed or altered.

(3) Whether such judgment is confirmed or reversed or altered, no costs shall in respect of the proceedings on review be payable by the prosecution to the person convicted or by the person convicted to the prosecution.

307. Execution of sentence not suspended unless bail granted.—(1) Subject to the provisions of section 308, the execution of any sentence shall not be suspended by the transmission of or the obligation to transmit the record for review unless the court which imposed the sentence releases the person convicted on bail.

(2) If the court releases such person on bail, the court may—

- (a) if the person concerned was released on bail under section 59 or 60, extend the bail, either in the same amount or any other amount; or
- (b) if such person was not so released on bail, release him or her on bail on condition that he or she deposits with the clerk of the court or with a member of the Department of Correctional Services at the prison where such person is in custody or with any police official at the place where such convicted person is in custody, the sum of money determined by the court in question; or

[Para. (b) substituted by s. 8 of Act No. 64 of 1982, by s. 12 (a) of Act No. 75 of 1995 and amended by s. 4 of Act No. 18 of 1996.]

Wording of Sections

- (c) on good cause shown, permit such person to furnish a guarantee, with or without sureties, that he will pay and forfeit to the State the sum of money determined under paragraph (b), in circumstances under which such sum, if it had been deposited, would be forfeited to the State.

(3) It shall be a condition of the release of the person convicted that he shall—

- (a) at a time and place specified by the court; and
- (b) upon service, in the manner prescribed by the rules of court, of a written order upon him or at a place specified by the court,

surrender himself in order that effect may be given to any sentence in respect of the proceedings in question.

(3A) (a) If the order contemplated in subsection (3) (b) is not served on the convicted person within 14 days of the issuing thereof because he or she cannot be found at the address given by him or her at the time of the granting of bail to him or her, the bail shall be provisionally cancelled and the bail money provisionally forfeited and a warrant for his or her arrest shall be issued.

(b) The provisions of section 67 (2) in respect of the confirmation or the lapsing of the provisional cancellation of bail or the forfeiture of bail money, and making final the provisional forfeiture of bail money, the provisions of section 67 (3) in respect of the hearing of evidence, and the provisions of section 70 in respect of the remission of forfeited bail money, shall *mutatis mutandis* apply in respect of bail pending review.

[Sub-s. (3A) inserted by s. 12 (b) of Act No. 75 of 1995.]

(4) The court may add any condition of release on bail which it may deem necessary or advisable in the interests of justice, *inter alia*, as to—

- (a) the reporting in person by the person convicted at any specified time and place to any specified person or authority;
- (b) any place to which such person is prohibited to go;
- (c) any other matter relating to the conduct of such person.

(5) The court which considers an application for bail under this section shall record the relevant proceedings in full, including the details referred to in subsection (3) and any conditions imposed under subsection (4).

(6) The provisions of sections 63, 64, 65, 66 and 68 shall *mutatis mutandis* apply with reference to bail pending review.

[Sub-s. (6) substituted by s. 17 of Act No. 56 of 1979 and by s. 12 (c) of Act No. 75 of 1995.]

Wording of Sections

308.

[Sub-s. (1) amended by s. 16 of Act No. 105 of 1982 and by s. 23 of Act No. 33 of 1986 and repealed by s. 2 of Act No. 33 of 1997.]

Wording of Sections

308A. Correctional supervision not suspended unless bail granted.—The execution of a sentence of correctional supervision referred to in section 276 (1) (h), shall not be suspended by the transmission of the record for review in terms of section 304 (4), unless the court which imposed the sentence releases the persons convicted—

- (a) on bail, in which case the provisions of section 307 (2), (3), (4), (5) and (6) shall *mutatis mutandis* apply;
- (b) on warning on a condition as contemplated in section 307 (3), in which case the provisions of section 72 shall *mutatis mutandis* apply to the extent to which they can be applied.

[S. 308A inserted by s. 50 of Act No. 129 of 1993.]

309. Appeal from lower court by person convicted.—(1) (a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was, at the time of the commission of the offence—

- (i) below the age of 14 years; or
- (ii) at least 14 years of age but below the age of 16 years and was not assisted by a legal representative at the time of conviction in a regional court; and
- (iii) was sentenced to any form of imprisonment as contemplated in section 276 (1) that was not wholly suspended,

he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a); and

[Para. (a) amended by s. 17 of Act No. 105 of 1982 and substituted by s. 2 (a) of Act No. 76 of 1997 and by s. 2 (a) of Act No. 42 of 2003.]

Wording of Sections

(b) Where, in the case of a regional court, a conviction takes place within the area of jurisdiction of one provincial division and any resultant sentence or order is passed or, as the case may be, is made within the area of jurisdiction of another provincial division, any appeal against such conviction or such sentence or order shall be heard by the last mentioned provincial division.

[Editorial Note: The words “subject to section 309B” in s. 309 (1) are inconsistent with the Constitution and have been declared invalid. The declaration of invalidity of this subsection is suspended for a period of six months from the date of the Constitutional Court Order published under Government Notice No. R.1328 in *Government Gazette* 21830 of 8 December, 2000.]

(2) An appeal under this section shall be noted and be prosecuted within the period and in the

manner prescribed by the rules of court: Provided that the magistrate against whose decision or order the appeal is to be noted, or if he or she is unavailable any other magistrate of the court concerned, may on application and on good cause shown, extend such period.

[Sub-s. (2) amended by s. 17 of Act No. 105 of 1982 and substituted by s. 2 (b) of Act No. 76 of 1997.]

Wording of Sections

(3) The provincial or local division concerned shall thereupon have the powers referred to in section 304 (2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.

[Sub-s. (3) amended by s. 17 of Act No. 105 of 1982, by s. 8 of Act No. 107 of 1990 and by s. 38 of Act No. 105 of 1997.]

Wording of Sections

(3A) (a) An appeal under this section must be disposed of by a High Court in chambers on the written argument of the parties or their legal representatives, unless the court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the Court regarding the appeal.

(b) If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in paragraph (a), the appeal may nevertheless be disposed of by that Court in chambers on the written argument of the parties or their legal representatives, if the parties or their legal representatives so request and the Judge President so agrees and directs in an appropriate case.

[Sub-s. (3A) inserted by s. 2 (c) of Act No. 76 of 1997 and substituted by s. 2 (b) of Act No. 42 of 2003.]

Wording of Sections

(4) When an appeal under this section is noted, the provisions of—

(a)

[Para. (a) deleted by s. 2 (d) of Act No. 76 of 1997.]

Wording of Sections

(b) sections 307 and 308A shall *mutatis mutandis* apply with reference to the sentence appealed against.

[Para. (b) substituted by s. 51 of Act No. 129 of 1993 and by s. 2 of Act No. 33 of 1997.]

Wording of Sections

(5) When a provincial or local division of the Supreme Court gives a decision on appeal against a decision of the magistrate's court and the former decision is appealed against, such division of the Supreme Court has the powers in respect of the granting of bail which a magistrate's court has in terms of section 307.

[Sub-s. (5) added by s. 13 of Act No. 75 of 1995.]

309A. Appeal against conviction and sentence of chiefs, headmen and chiefs' deputies.—(1) In hearing any appeal to him under the provisions of section 20 of the Black Administration Act, 1927 (Act No. 38 of 1927), the magistrate shall hear and record such available evidence as may be relevant to any question in issue and shall thereupon either—

(a) confirm or vary the conviction and—

- (i) confirm the sentence imposed by the chief, headman or chief's deputy and order that the said sentence be satisfied forthwith; or
- (ii) set aside the sentence imposed by the chief, headman or chief's deputy and in lieu thereof impose such other sentence as in his opinion ought to have been imposed; and
- (iii) impose a sentence of imprisonment for a period not exceeding three months on default of compliance forthwith with the order or sentence made or imposed under subparagraph (i) or (ii); or
- (iv) set aside the sentence imposed by the chief, headman or chief's deputy and in lieu thereof impose a sentence of imprisonment for a period not exceeding three months without the option of a fine;

or—

- (b) uphold the appeal and set aside the conviction and sentence.

(2) The magistrate shall issue in respect of any person who has been sentenced to imprisonment under subsection (1), a warrant for his detention in a prison.

[S. 309A inserted by s. 2 of Act No. 34 of 1986.]

309B. Application for leave to appeal.—(1) (a) Any accused, other than a person contemplated in the first proviso to section 309 (1) (a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.

- (b) An application referred to in paragraph (a) must be made—

- (i) within 14 days after the passing of the sentence or order following on the conviction; or
- (ii) within such extended period as the court may on application and for good cause shown, allow.

(2) (a) Any application in terms of subsection (1) must be heard by the magistrate whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) or, if the trial magistrate is not available, by any other magistrate of the court concerned, to whom it is assigned for hearing.

(b) Any application is to be heard by a magistrate, other than the trial magistrate, the clerk of the court must submit a copy of the record of the proceedings before the trial magistrate to the magistrate hearing the application: Provided that where the accused was legally represented at a trial in a regional court the clerk of the court must, subject to paragraph (c), only submit a copy of the judgment of the trial magistrate, including the reasons for the conviction, sentence or order in respect of which the appeal is sought to be noted to the magistrate hearing the application.

(c) The magistrate referred to in the proviso to paragraph (b) may, if he or she deems it necessary in order to decide the application, request the full record of the proceedings before the trial magistrate.

(d) Notice of the date fixed for the hearing of the application must be given to the Director of Public Prosecutions concerned, or to a person designated thereto by him or her, and the accused.

(3) (a) Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.

- (b) If the accused applies orally for such leave immediately after the passing of the sentence

or order, he or she must state such grounds, which must be recorded and form part of the record.

(4) (a) If an application for leave to appeal under subsection (1) is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of all relevant documents to the registrar of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the High Court concerned may nevertheless call for the production of the whole record.

(b) If any application referred to in this section is refused, the magistrate must immediately record his or her reasons for such refusal.

(5) (a) An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.

(b) An application for further evidence must be supported by an affidavit stating that—

- (i) further evidence which would presumably be accepted as true, is available;
- (ii) if accepted the evidence could reasonably lead to a different decision or order; and
- (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must—

- (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
- (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

[S. 309B inserted by s. 3 of Act No. 76 of 1997 and substituted by s. 3 of Act No. 42 of 2003.]

Wording of Sections

309C. Petition procedure.—(1) In this section—

- (a) “application for condonation” means an application referred to in the proviso to section 309 (2), or referred to in section 309B (1) (b) (ii);
- (b) “application for leave to appeal” means an application referred to in section 309B (1) (a);
- (c) “application for further evidence” means an application to adduce further evidence referred to in section 309B (5) (a); and
- (d) “petition”, unless the context otherwise indicates, includes an application referred to in subsection (2) (b) (ii).

(2) (a) If any application—

- (i) for condonation;
- (ii) for further evidence; or
- (iii) for leave to appeal,

is refused by a lower court, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question.

(b) Any petition referred to in paragraph (a) must be made—

- (i) within 21 days after the application in question was refused; or
- (ii) within such extended period as may on an application accompanying that petition, for good cause shown, be allowed.

(3) (a) If more than one application referred to in subsection (1) relate to the same matter, they should, as far as is possible, be dealt with in the same petition.

(b) An accused who submits a petition in terms of subsection (2) must at the same time give notice thereof to the clerk of the lower court referred to in subsection (2) (a).

(4) When receiving the notice referred to in subsection (3), the clerk of the court must without delay submit to the registrar of the High Court concerned copies of—

- (a) The application that was refused;
- (b) the magistrate's reasons for refusal of the application; and
- (c) the record of the proceedings in the magistrate's court in respect of which the application was refused: Provided that—
 - (i) if the accused was tried in a regional court and was legally represented at the trial; or
 - (ii) if the accused and the Director of Public Prosecutions agree thereto; or
 - (iii) if the prospective appeal is against the sentence only; or
 - (iv) if the petition relates solely to an application for condonation,

a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (6) (a), suffice for the purposes of the petition.

(5) (a) A petition contemplated in this section must be considered in chambers by a judge designated by the Judge President: Provided that the Judge President may, in exceptional circumstances, at any stage designate two judges to consider such petition.

(b) If the judges referred to in the proviso to paragraph (a) differ in opinion, the petition must also be considered in chambers by the Judge President or by any other judge designated by the Judge President.

(c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.

(6) Judges considering a petition may—

- (a) call for any further information, including a copy of the record of any proceedings that was not submitted in terms of the proviso to subsection (4) (c), from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which any such application relates, as the case may be; or
- (b) in exceptional circumstances, order that the petition or any part thereof be argued before them at a time and place determined by them.

(7) Judges considering a petition may, whether they have acted under subsection 6 (a) or (b) or not—

- (a) in the case of an application referred to in subsection (2) (b) (ii), grant or refuse the application; and
- (b) in the case of an application for condonation, grant or refuse the application, and if the application is granted—

- (i) direct that an application for leave to appeal must be made, within the period fixed by them, to the court referred to in section 309B (1); or
 - (ii) if they deem it expedient, direct that an application for leave to appeal must be submitted under subsection (2) within the period fixed by them as if it had been refused by the court referred to in section 309B (1); and
 - (c) in the case of an application for leave to appeal, subject to paragraph (d), grant or refuse the application; and
 - (d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the magistrate's court concerned in order that further evidence may be received in accordance with section 309B (5).
- (8) All applications contained in a petition must be disposed of—
- (a) as far as is possible, simultaneously; and
 - (b) as a matter of urgency, where the accused was sentenced to any form of imprisonment that was not wholly suspended.

(9) Notice of the date fixed for any hearing of a petition under this section, and of any place determined under subsection (6) for any hearing, must be given to the Director of Public Prosecutions concerned, or to a person designated by him or her, and the accused.

[S. 309C inserted by s. 3 of Act No. 76 of 1997 and substituted by s. 3 of Act No. 42 of 2003.]

Wording of Sections

309D. Explanation of certain rights to unrepresented and certain other accused.—(1) (a) An accused contemplated in the first proviso to section 309 (1) (a) or who is unrepresented at the time he or she is convicted and sentenced, must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.

(b) An accused whose sentence is subject to review in the ordinary course in terms of section 302 (1) (a), must be informed by the presiding officer that the provisions pertaining to such review—

- (i) shall be suspended if he or she appeals against that conviction or sentence; and
- (ii) shall cease to apply once judgment in the appeal has been given.

(2) An accused contemplated in subsection (1) (a) in respect of whom an application in terms of the proviso to section 309 (2) or 309B is refused, must be informed by the presiding officer of his or her rights in respect of the proceedings contemplated in section 309C and legal representation and of the correct procedures involved to give effect to these rights.

(3) If an unrepresented accused has been convicted and sentenced—

- (a) to any form of imprisonment that was not wholly suspended; or
- (b) to any form of punishment which in view of the presiding officer may lead to substantial injustice for the accused,

and he or she indicates to the presiding officer his or her intention to apply for leave to appeal in terms of section 309B (1) (a) or for leave to petition in terms of section 309C (2) (a), the presiding officer must refer the accused to the Legal Aid Board referred to in Section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969), for the purpose of allowing him or her an opportunity to request legal representation to assist such accused in his or her application.

[S. 309D inserted by s. 3 of Act No. 76 of 1997 and substituted by s. 3 of Act No. 42 of 2003.]

Wording of Sections

310. Appeal from lower court by prosecutor.—(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85 (2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.

[Sub-s. (1) amended by s. 18 of Act No. 105 of 1982.]

Wording of Sections

(2) When such case has been stated, the attorney-general or other prosecutor, as the case may be, may appeal from the decision to the provincial or local division having jurisdiction.

[Sub-s. (2) amended by s. 18 of Act No. 105 of 1982.]

Wording of Sections

(3) The provisions of section 309 (2) shall apply with reference to an appeal under this section.

(4) If the appeal is allowed, the court which gave the decision appealed from shall, subject to the provisions of subsection (5) and after giving sufficient notice to both parties, reopen the case in which the decision was given and deal with it in the same manner as it should have dealt therewith if it had given a decision in accordance with the law as laid down by the provincial or local division in question.

[Sub-s. (4) amended by s. 18 of Act No. 105 of 1982.]

Wording of Sections

(5) In allowing the appeal, whether wholly or in part, the provincial or local division may itself impose such sentence or make such order as the lower court ought to have imposed or made, or it may remit the case to the lower court and direct that court to take such further steps as the provincial or local division considers proper.

[Sub-s. (5) amended by s. 18 of Act No. 105 of 1982.]

Wording of Sections

310A. Appeal by attorney-general against sentence of lower court.—(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.

(2) (a) A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.

(b) The notice shall state briefly the grounds for the application.

(3) The attorney-general shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.

(4) An accused may, within a period of 10 days of the serving of such a notice upon him, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge

who is to hear the application, and shall send a copy thereof to the attorney-general.

(5) Subject to the provisions of this section, section 309 shall apply *mutatis mutandis* with reference to an appeal in terms of this section.

(6) Upon an application for leave to appeal referred to in subsection (1) or an appeal in terms of this section, the judge or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the provincial or local division concerned.

[S. 310A inserted by s. 9 of Act No. 107 of 1990.]

311. Appeal to Appellate Division.—(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of—

- (a) section 309 (1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable; or
- (b) section 310 (2), give such decision or take such action as the provincial or local division ought, in the opinion of the said Appellate Division, to have given or taken (including any action under section 310 (5)), and thereupon the provisions of section 310 (4) shall *mutatis mutandis* apply.

[Sub-s. (1) amended by s. 19 of Act No. 105 of 1982. Para. (b) amended by s. 19 of Act No. 105 of 1982.]

Wording of Sections

(2) If an appeal brought by the attorney-general or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the attorney-general is the appellant, the costs which he is so ordered to pay shall be paid by the State.

312. Review or appeal and failure to comply with subsection (1) (b) or (2) of section 112.—(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1) (b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.

[Sub-s. (1) substituted by s. 23 of Act No. 59 of 1983.]

Wording of Sections

(2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112 (1) (b) or 112 (2), he shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter.

313. Institution of proceedings de novo when conviction set aside on appeal or review.—The provisions of section 324 shall *mutatis mutandis* apply with reference to any conviction and sentence of a lower court that are set aside on appeal or review on any ground referred to in that section.

314. Obtaining presence of convicted person in lower court after setting aside of sentence or order.—(1) Where a sentence or order imposed or made by a lower court is set aside on appeal or review and the person convicted is not in custody and the court setting aside the sentence or order remits the matter to the lower court in order that a fresh sentence or order may be imposed or made, the presence before that court of the person convicted may be obtained by means of a written notice addressed to that person calling upon him to appear at a stated place and time on a stated date in order that such sentence or order may be imposed or made.

(2) The provisions of section 54 (2) and 55 (1) and (2) shall *mutatis mutandis* apply with reference to a written notice issued under subsection (1).

CHAPTER 31 APPEALS IN CASES OF CRIMINAL PROCEEDINGS IN SUPERIOR COURTS

315. Court of appeal in respect of superior court judgments.—(1) (a) In respect of appeals and questions of law reserved in connection with criminal cases heard by a High Court, the court of appeal shall be the Supreme Court of Appeal, except in so far as subsections (2) and (3) otherwise provides.

(b) Any appeal or question of law referred to in paragraph (a) must be disposed of in chambers on the written argument of the parties or their legal representatives, unless the Judge President or the President of the Supreme Court of Appeal, as the case may be, is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument regarding the appeal or question of law.

(c) If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in paragraph (b), the appeal may nevertheless be disposed of in chambers on the written argument of the parties or their legal representatives, if the parties or their legal representatives so request and the Judge President or the President of the Supreme Court of Appeal, as the case may be, so agrees and directs in an appropriate case.

[Sub-s. (1) substituted by s. 11 of Act No. 62 of 2000 and by s. 4 (a) of Act No. 42 of 2003.]

Wording of Sections

(2) (a) If an application for leave to appeal in a criminal case heard by a single judge of a High Court (irrespective of whether he or she sat with or without assessors) is granted under section 316, the court of judge or judges granting the application shall, if it, he or she or, in the case of the judges referred to in subsections (12) and (13) of that section, they or the majority of them, is or are satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, direct that the appeal be heard by a full court.

(b) Any such direction by the court or a judge of a High Court may be set aside by the Supreme Court of Appeal on application made to it by the accused or the Director of Public Prosecutions or other prosecutor within 21 days, or such longer period as may on application to the Supreme Court of Appeal on good cause shown, be allowed, after the direction was given.

(c) Any application to the Supreme Court of Appeal under paragraph (b) shall be submitted by petition addressed to the President of the Supreme Court of Appeal, and the provisions of section 316 (8), (9), (10), (11), (12), (13), (14) and (15) shall apply *mutatis mutandis* in respect thereof; and

[Sub-s. (2) amended by s. 39 (a) of Act No. 105 of 1997 and substituted by s. 4 (b) of Act No. 42 of 2003.]

Wording of Sections

(3) An appeal which is to be heard by a full court in terms of a direction under paragraph (a) of subsection (2) which has not been set aside under paragraph (b) of that subsection, shall be heard—

- (a) in the case of an appeal in a criminal case heard by a single judge of a provincial division, by the full court of the provincial division concerned;
- (b) in the case of an appeal in a criminal case heard by a single judge of a local division other than the Witwatersrand Local Division, by the full court of the provincial division which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned;
- (c) in the case of an appeal in a criminal case heard by a single judge of the Witwatersrand Local Division—
 - (i) by the full court of the Transvaal Provincial Division, unless a direction by the judge president of that provincial division under subparagraph (ii) applies to it; or
 - (ii) by the full court of the said local division if the said judge president has so directed in the particular instance.

(4) An appeal in terms of this Chapter shall lie only as provided in sections 316 to 319 inclusive, and not as of right.

[Sub-s. (4) substituted by s. 10 of Act No. 107 of 1990 and by s. 39 (b) of Act No. 105 of 1997.]

Wording of Sections

(5) In this Chapter—

- (a) “court of appeal” means, in relation to an appeal which in terms of subsection (3) is heard or is to be heard by a full court, the full court concerned and, in relation to any other appeal, the Supreme Court of Appeal.

[Para. (a) substituted by s. 4 (c) of Act No. 42 of 2003.]

Wording of Sections

- (b) “full court” means the court of a provincial division, or the Witwatersrand Local Division, sitting as a court of appeal and constituted before three judges.

[S. 315 substituted by s. 20 of Act No. 105 of 1982.]

Wording of Sections

316. Applications for condonation, leave to appeal and further evidence.—(1) (a) any accused, other than an accused contemplated in paragraph (c), convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order.

(b) An application referred to in paragraph (a) must be made—

- (i) within 14 days after the passing of the sentence or order following on the conviction; or
- (ii) within such extended period as the court may on application and for good cause shown, allow.

(c) If an accused was convicted of any offence by a High Court and that accused was, at the time of the commission of the offence—

- (i) below the age of 14 years; or
- (ii) at least 14 years of age but below the age of 16 years and was not assisted by a legal representative at the time of conviction; and

- (iii) was sentenced to any form of imprisonment as contemplated in section 276 (1) that was not wholly suspended,

he or she may note such an appeal without having to apply for leave in terms of paragraph (a).

(2) (a) An application referred to in subsection (1) must be made to the judge whose conviction, sentence or order is the subject of the prospective appeal (hereafter in this section referred to as the trial judge): Provided that if—

- (i) the trial judge is not available; or

(ii) in the case of a conviction before a circuit court the said court is not in sitting, the application may be made to any other judge of the High Court concerned.

(b) If the application is to be heard by a judge, other than the trial judge, the registrar of the court must submit a copy of the judgment of the trial judge, including the reasons for the conviction, sentence or order in respect of which the appeal is sought to be noted to the judge hearing the application.

(c) The judge referred to in paragraph (b) may, if he or she deems it necessary in order to decide the application, request the full record of the proceedings before the trial judge.

(3) (a) No appeal shall lie against the judgment or order of a full court given on appeal to it in terms of section 315 (3), except with the special leave of the Supreme Court of Appeal on application made to it by the accused or, where a full court has for the purposes of such judgment or order given a decision in favour of the accused on a question of law, on application on the grounds of such decision made to that court by the Director of Public Prosecutions or other prosecutor against whom the decision was given.

(b) An application to the Supreme Court of Appeal under paragraph (a) shall be submitted by petition addressed to the President of the Supreme Court of Appeal—

- (i) within 21 days after the judgment or order against which appeal is to be made was given; or
- (ii) within such extended period as may on application and for good cause shown, be allowed.

(c) The accused or Director of Public Prosecutions or other prosecutor shall, when submitting in accordance with paragraph (b) the application for special leave to appeal, at the same time give written notice that this has been done to the registrar of the court against whose decision he or she wishes to appeal, and thereupon such registrar shall forward a certified copy of the record prepared in terms of subsection (7) for the purposes of such judgment or order, and of the reasons for such judgment or order, to the registrar of the Supreme Court of Appeal.

(d) The provisions of subsections (4), (10), (11), (12), (13), (14) and (15) shall apply *mutatis mutandis* with reference to any application and petition contemplated in paragraph (b) of this subsection.

(e) Upon an appeal under this subsection the provisions of section 322 shall apply *mutatis mutandis* with reference to the powers of the Supreme Court of Appeal.

(4) (a) Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.

(b) If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record.

(5) (a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.

- (b) An application for further evidence must be supported by an affidavit stating that—
- (i) further evidence which would presumably be accepted as true, is available;
 - (ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
 - (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
- (c) The court granting an application for further evidence must—
- (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
 - (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.

(7) (a) If an application under subsection (1) for leave to appeal is granted and the appeal is not under section 315 (3) to be heard by the full court of the High Court from which the appeal is made, the registrar of the court granting such application shall cause notice to be given accordingly to the registrar of the Supreme Court of Appeal without delay, and shall cause to be transmitted to the said registrar a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the Supreme Court of Appeal may nevertheless call for the production of the whole record.

(b) If an application under subsection (1) for leave to appeal is granted and the appeal is under section 315 (3) to be heard by the full court of the High Court from which the appeal is made, the registrar shall without delay prepare a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be prepared of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the full court of the High Court concerned may nevertheless call for the production of the whole record.

(8) (a) If any application—

- (i) referred to in subsection (1) (b) (ii) (hereafter in this section referred to as an application for condonation);
- (ii) referred to in subsection (1) (b) (i) (hereafter in this section referred to as an application for leave to appeal); or
- (iii) referred to in subsection (5) (a) to adduce further evidence (hereafter in this section referred to as an application for further evidence),

is refused by a High Court, the accused may by petition apply to the President of the Supreme Court of Appeal to grant any one or more of the applications in question.

(b) Any petition referred to in paragraph (a) must be made—

- (i) within 21 days after the application in question was refused; or
- (ii) within such extended period as may on an application accompanying that petition, for

good cause shown, be allowed.

(9) (a) If more than one application referred to in subsection (8) (a) relate to the same matter, they should, as far as is possible, be dealt with in the same petition.

(b) An accused who submits a petition referred to in subsection (8) (a), must at the same time give written notice thereof to the registrar of the High Court (other than a circuit court) within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he or she so presided.

(10) When receiving notice of a petition as contemplated in subsection (9), the registrar shall forward to the registrar of the Supreme Court of Appeal copies of the—

- (a) application or applications that were refused;
- (b) the reasons for refusing such application or applications; and
- (c) the record of the proceedings in the High Court in respect of which the application was refused: Provided that—
 - (i) if the accused was legally represented at the trial; or
 - (ii) if the accused and the prosecuting authority agree thereto; or
 - (iii) if the prospective appeal is against the sentence only; or
 - (iv) if the petition relates solely to an application for condonation,

a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (12) (a), suffice for the purposes of the petition.

(11) (a) A petition referred to in subsection (8), including an application referred to in subsection (8) (b) (ii), must be considered in chambers by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal.

(b) If the judges differ in opinion, the petition shall also be considered in chambers by the President of the Supreme Court of Appeal or by any other judge of the Supreme Court of Appeal to whom it has been referred by the President.

(c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.

(12) The judges considering a petition may—

- (a) call for any further information, including a copy of the record of the proceedings that was not submitted in terms of the proviso to subsection (10) (c), from the judge who refused the application in question, or from the judge who presided at the trial to which any such application relates, as the case may be; or
- (b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them.

(13) The judges considering a petition may, whether they have acted under subsection (12) (a) or (b) or not—

- (a) in the case of an application referred to in subsection (8) (b) (ii), grant or refuse the application; and
- (b) in the case of an application for condonation grant or refuse the application, and if the application is granted—
 - (i) direct that an application for leave to appeal must be made, within the period fixed by them, to the High Court referred to in subsection (8) (a); or
 - (ii) if they deem it expedient, direct that an application for leave to appeal must be

submitted under subsection (8) within the period fixed by them as if it had been refused by the High Court referred to in subsection (8) (a); and

- (c) in the case of an application for leave to appeal, subject to paragraph (d), grant or refuse the application; and
- (d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the High Court concerned in order that further evidence may be received in accordance with subsection (5) (c); or
- (e) in exceptional circumstances refer the petition to the Supreme Court of Appeal for consideration, whether upon argument or otherwise, and the Supreme Court of Appeal may thereupon deal with the petition in any manner referred to in this subsection.

(14) All applications contained in a petition must be disposed of—

- (a) as far as is possible, simultaneously; and
- (b) as a matter of urgency, where the accused was sentenced to any form of imprisonment that was not wholly suspended.

(15) Notice of the date fixed for the hearing of any application under this section, and of any time and place determined under subsection (12) for any hearing, must be given to the Director of Public Prosecutions concerned and the accused.

[S. 316 amended by s. 12 of Act No. 62 of 2000, by s. 21 (a), (b), (c), (d), (e), (f) and (g) of Act No. 105 of 1982, by s. 15 (a) and (b) of Act No. 26 of 1987 and substituted by s. 5 of Act No. 42 of 2003.]

Wording of Sections

316A.

[S. 316A inserted by s. 11 of Act No. 107 of 1990 and repealed by s. 40 of Act No. 105 of 1997.]

Wording of Sections

316B. Appeal by attorney-general against sentence of superior court.—(1) Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a superior court.

(2) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of subsection (1) of this section.

(3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

[S. 316B inserted by s. 11 of Act No. 107 of 1990.]

317. Special entry of irregularity or illegality.—(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the

application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court; and

[Sub-s. (1) substituted by s. 6 (a) of Act No. 42 of 2003.]

Wording of Sections

(2) Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the trial or, if he is not available, or, if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the provincial or local division of which that judge was a member when he so presided.

(3)

[Sub-s. (3) deleted by s. 13 of Act No. 62 of 2000.]

Wording of Sections

(4) The terms of a special entry shall be settled by the court which or the judge who grants the application for a special entry.

(5) If an application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (11), (12), (13), (14) and (15) of section 316 shall *mutatis mutandis* apply.

[Sub-s. (5) amended by s. 22 of Act No. 105 of 1982 and substituted by s. 6 (b) of Act No. 42 of 2003.]

Wording of Sections

318. Appeal on special entry under section 317.—(1) If a special entry is made on the record, the person convicted may appeal to the Appellate Division against his conviction on the ground of the irregularity stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the Appellate Division and to the registrar of the provincial or local division, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided.

[Sub-s. (1) amended by s. 23 of Act No. 105 of 1982.]

Wording of Sections

(2) The registrar of such provincial or local division shall forthwith after receiving such notice give notice thereof to the attorney-general and shall transmit to the registrar of the Appellate Division a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial and of the special entry: Provided that with the consent of the accused and the attorney-general, the registrar concerned may, instead of transmitting the whole record, transmit copies, one of which shall be certified, of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the Appellate Division may nevertheless call for the production of the whole record.

[Sub-s. (2) amended by s. 23 of Act No. 105 of 1982.]

Wording of Sections

319. Reservation of question of law.—(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division,

and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

[Sub-s. (1) amended by s. 24 of Act No. 105 of 1982.]

Wording of Sections

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.

(3) The provisions of sections 317 (2), (4) and (5) and 318 (2) shall apply *mutatis mutandis* with reference to all proceedings under this section.

[Sub-s. (3) substituted by s. 14 of Act No. 62 of 2000.]

Wording of Sections

320. Report of trial judge to be furnished on appeal.—The judge or judges, as the case may be, of any court before whom a person is convicted shall, in the case of an appeal under section 316 or 316B or of an application for a special entry under section 317 or the reservation of a question of law under section 319 or an application to the court of appeal for leave to appeal or for a special entry under this Act, furnish to the registrar a report giving his, her or their opinion upon the case or upon any point arising in the case, and such report, which shall form part of the record, shall without delay be forwarded by the registrar to the registrar of the court of appeal.

[S. 320 substituted by s. 12 of Act No. 107 of 1990 and by s. 41 of Act No. 105 of 1997.]

Wording of Sections

321. When execution of sentence may be suspended.—(1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless—

(a)

[Para. (a) deleted by s. 2 of Act No. 33 of 1997.]

Wording of Sections

(b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided:

Provided that when the accused is ultimately sentenced to imprisonment the time during which he was so released on bail shall be excluded in computing the term for which he is so sentenced: Provided further that when the accused has been detained as an unconvicted prisoner, the time during which he has been so detained shall be included or excluded in computing the term for which he is ultimately sentenced, as the court of appeal may determine.

(2) If the court orders that the accused be released on bail, the provisions of sections 66, 67 and 68 and of subsections (2), (3), (4) and (5) of section 307 shall *mutatis mutandis* apply with reference to bail so granted, and any reference in—

(a) section 66 to the court which may act under that section, shall be deemed to be a reference to the superior court by which the accused was released on bail;

(b) section 67 to the court which may act under that section, shall be deemed to be a reference to the magistrate's court within whose area of jurisdiction the accused is to surrender himself in order that effect be given to any sentence in respect of the proceedings in question; and

(c) section 68 to a magistrate shall be deemed to be a reference to a judge of the superior

court in question.

322. Powers of court of appeal.—(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may—

- (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
- (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
- (c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

(2) Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial.

[Sub-s. (2) substituted by s. 13 (a) of Act No. 107 of 1990.]

Wording of Sections

(2A)

[Sub-s. (2A) inserted by s. 13 (b) of Act No. 107 of 1990 and deleted by s. 42 (a) of Act No. 105 of 1997.]

Wording of Sections

(3) Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit.

(4) Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct.

(5) The order or direction of the court of appeal shall be transmitted by the registrar of that court to the registrar of the court before which the case was tried, and such order or direction shall be carried into effect and shall authorize every person affected by it to do whatever is necessary to carry it into effect.

(6) The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment.

[Sub-s. (6) substituted by s. 13 (c) of Act No. 107 of 1990 and substituted by s. 42 (b) of Act No. 105 of 1997.]

Wording of Sections

323.

[S. 323 amended by s. 25 of Act No. 105 of 1982, substituted by s. 14 of Act No. 107 of 1990 and repealed by s. 43 of Act No. 105 of 1997.]

Wording of Sections

324. Institution of proceedings de novo when conviction set aside on appeal.—Whenever a conviction and sentence are set aside by the court of appeal on the ground—

- (a) that the court which convicted the accused was not competent to do so; or
- (b) that the indictment on which the accused was convicted was invalid or defective in any respect; or
- (c) that there has been any other technical irregularity or defect in the procedure,

proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.

CHAPTER 32 MERCY AND FREE PARDON

325. Saving of power of State President to extend mercy.—Nothing in this Act shall affect the power of the State President to extend mercy to any person.

325A.

[S. 325A inserted by s. 15 of Act No. 107 of 1990 and repealed by s. 44 of Act No. 105 of 1997.]

Wording of Sections

326.

[S. 326 repealed by s. 44 of Act No. 105 of 1997.]

Wording of Sections

327. Further evidence and free pardon or substitution of verdict by State President.—(1) If any person convicted of any offence in any court has in respect of the conviction exhausted all the recognized legal procedures pertaining to appeal or review, or if such procedures are no longer available to him or her, and such person or his or her legal representative addresses the Minister by way of petition, supported by relevant affidavit, stating that further evidence has since become available which materially affects his or her conviction, the Minister may, if he or she considers that such further evidence, if true, might reasonably affect the conviction, direct that the petition and the relevant affidavits be referred to the court in which the conviction occurred.

[Sub-s. (1) substituted by s. 16 (a) of Act No. 107 of 1990 and by s. 45 (a) of Act No. 105 of 1997.]

Wording of Sections

(2) The court shall receive the said affidavits as evidence and may examine and permit the examination of any witness in connection therewith, including any witness on behalf of the State, and to this end the provisions of this Act relating to witnesses shall apply as if the matter before the court were a criminal trial in that court.

(3) Unless the court directs otherwise, the presence of the convicted person shall not be essential at the hearing of further evidence.

[Sub-s. (3) substituted by s. 45 (b) of Act No. 105 of 1997.]

Wording of Sections

(4) (a) The court shall assess the value of the further evidence and advise the President

whether, and to what extent, such evidence affects the conviction in question.

(b) The court shall not, as part of the proceedings of the court, announce its finding as to the further evidence or the effect thereof on the conviction in question.

[Sub-s. (4) substituted by s. 45 (b) of Act No. 105 of 1997.]

Wording of Sections

(5) The court shall be constituted as it was when the conviction occurred or, if it cannot be so constituted, the judge-president or, as the case may be, the senior regional magistrate or magistrate of the court in question, shall direct how the court shall be constituted.

(6) (a) The State President may, upon consideration of the finding or advice of the court under subsection (4)—

- (i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or
- (ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law; or
- (iii)

[Sub-para. (iii) deleted by s. 45 (c) of Act No. 105 of 1997.]

Wording of Sections

(b) The State President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (a), other than a decision taken under subparagraph (iii) of that paragraph, and to publish a notice in the *Gazette* in which such decision, other than a decision taken under the said subparagraph (iii), is set out.

(7) No appeal, review or other proceedings of whatever nature shall lie in respect of—

- (a) a refusal by the Minister to issue a direction under subsection (1) or by the State President to act upon the finding or advice of the court under subsection (4) (a); or

[Para. (a) substituted by s. 16 (b) of Act No. 107 of 1990.]

Wording of Sections

- (b) any aspect of the proceedings, finding or advice of the court under this section.

CHAPTER 33 GENERAL PROVISIONS

328. Force of process.—Any warrant, subpoena, summons or other process relating to any criminal matter shall be of force throughout the Republic and may be executed anywhere within the Republic.

329. Court process may be served or executed by police official.—Any police official shall, subject to the rules of court, be as qualified to serve or execute any subpoena or summons or other document under this Act as if he had been appointed deputy sheriff or deputy messenger or other like officer of the court.

330. Transmission of court process by telegraph or similar communication.—Any document, order or other court process which under this Act or the rules of court is required to be

served or executed with reference to any person, may be transmitted by telegraph or similar written or printed communication, and a copy of such telegraph or communication, served or executed in the same manner as the relevant document, order or other court process is required to be served or executed, shall be of the same force and effect as if the document, order or other court process in question had itself been served or executed.

331. Irregular warrant or process.—Any person who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent on the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were good in law.

332. Prosecution of corporations and members of associations.—(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law—

- (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
- (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

(2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question: Provided that—

- (a) if the said person pleads guilty, other than by way of admitting guilt under section 57, the plea shall not be valid unless the corporate body authorized him to plead guilty;
- (b) if at any stage of the proceedings the said person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for the said person any other person who is a director or servant of the said corporate body at the time of the said substitution, and thereupon the proceedings shall continue as if no substitution had taken place;
- (c) if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;
- (d) the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5).

(3) In criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such director,

servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his activities as such director, servant or agent, shall be admissible in evidence against the accused.

(4) For the purposes of subsection (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or under his control, shall be presumed to have been made or kept by him or to have been in his custody or under his control within the scope of his activities as such director, servant or agent, unless the contrary is proved.

(5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

(6) In criminal proceedings against a director or servant of a corporate body in respect of an offence—

- (a) any evidence which would be or was admissible against that corporate body in a prosecution for that offence, shall be admissible against the accused;
- (b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or under the control of any director, servant or agent, of such corporate body, in his capacity as director, servant or agent, shall be *prima facie* proof of its contents and admissible in evidence against the accused, unless he is able to prove that at all material times he had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or the making of any relevant entries in such book or record.

(7) When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this subsection shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body.

(8) In any proceedings against a member of an association of persons in respect of an offence mentioned in subsection (7) any record which was made or kept by any member or servant or agent of the association within the scope of his activities as such member, servant or agent, or any document which was at any time in the custody or under the control of any such member, servant or agent within the scope of his activities as such member, servant or agent, shall be admissible in evidence against the accused.

(9) For the purposes of subsection (8) any record made or kept by a member or servant or agent of an association, or any document which was at any time in his custody or under his control, shall be presumed to have been made or kept by him or to have been in his custody or under his control within the scope of his activities as such member or servant or agent, unless the contrary is proved.

(10) In this section the word “director” in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body.

(11) The provisions of this section shall be additional to and not in substitution for any other law which provides for a prosecution against corporate bodies or their directors or servants or against associations of persons or their members.

(12) Where a summons under this Act is to be served on a corporate body, it shall be served on the director or servant referred to in subsection (2) and in the manner referred to in section 54 (2).

333. Minister may invoke decision of Appellate Division on question of law.— Whenever the Minister has any doubt as to the correctness of any decision given by any superior court in any criminal case on a question of law, or whenever a decision in any criminal case on a question of law is given by any division of the Supreme Court which is in conflict with a decision in any criminal case on a question of law given by any other division of the Supreme Court, the Minister may submit such decision or, as the case may be, such conflicting decisions to the Appellate Division of the Supreme Court and cause the matter to be argued before that Court in order that it may determine such question of law for the future guidance of all courts.

334. Minister may declare certain persons peace officers for specific purposes.—(1) (a) The Minister may by notice in the *Gazette* declare that any person who, by virtue of his office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.

(b) The powers referred to in paragraph (a) may include any power which is not conferred upon a peace officer by this Act.

(2) (a) No person who is a peace officer by virtue of a notice issued under subsection (1) shall exercise any power conferred upon him under that subsection unless he is at the time of exercising such power in possession of a certificate of appointment issued by his employer, which certificate shall be produced on demand.

(b) A power exercised contrary to the provisions of paragraph (a) shall have no legal force or effect.

(3) The Minister may by notice in the *Gazette* prescribe—

(a) the conditions which shall be complied with before a certificate of appointment may validly be issued under subsection (2) (a);

(b) any matter which shall appear in or on such certificate of appointment in addition to any matter which the employer may include in such certificate.

(4) Where the employer of any person who becomes a peace officer under the provisions of this section would be liable for damages arising out of any act or omission by such person in the discharge of any power conferred upon him under this section, the State shall not be liable for such damages unless the State is the employer of that person, in which event the department of State, including a provincial administration, in whose service such person is, shall be so liable.

335. Person who makes statement entitled to copy thereof.—Whenever a person has in relation to any matter made to a peace officer a statement in writing or a statement which was reduced to writing, and criminal proceedings are thereafter instituted against such person in connection with that matter, the person in possession of such statement shall furnish the person who made the

statement, at his request, with a copy of such statement.

335A. Prohibition of publication of identity of persons towards or in connection with whom certain offences have been committed.—(1) No person shall, with regard to any offence referred to in section 153 (3) (a) and (b), as from the date on which the offence in question was committed or allegedly committed, until the prohibition in terms of section 154 (2) (b) of the publication of information relating to the charge in question commences, publish any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except with the authorization of a magistrate granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 500 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[S. 335A inserted by s. 4 of Act No. 103 of 1987.]

335B. Medical examination of minors towards or in connection with whom certain offences have been committed.—(1) If a police official charged with the investigation of a case is of the opinion that it is necessary that a minor in respect of whom it is alleged that an offence of an indecent or violent nature has been committed be examined by a district surgeon or, if he is not available, by a registered medical practitioner, but that the parent or guardian of such minor—

- (a) cannot be traced within a reasonable time;
- (b) cannot grant consent in time;
- (c) is a suspect in respect of the offence in consequence of which the examination must be conducted;
- (d) unreasonably refuses to consent that the examination be conducted;
- (e) is incompetent on account of mental disorder to consent that the examination be conducted; or
- (f) is deceased,

a magistrate may, on the written application of that police official and if he is satisfied that the medical examination is necessary, grant the necessary consent that such examination be conducted.

(2) If a magistrate is not available to grant consent as referred to in subsection (1), a commissioned officer as defined in Act section 1 of the Police Act, 1958 (Act No. 7 of 1958), or the police official in charge of the local police station may in writing grant such consent if the police official charged with the investigation of the case declares under oath that the consent of a magistrate cannot be obtained within a reasonable period of time and the district surgeon or registered medical practitioner declares under oath that the purpose of the medical examination will be defeated if the examination is not conducted forthwith.

[S. 335B inserted by s. 7 of Act No. 4 of 1992.]

336. Act or omission constituting offence under two or more laws.—Where an act or omission constitutes an offence under two or more statutory provisions or is an offence against a statutory provision and the common law, the person guilty of such act or omission shall, unless the contrary intention appears, be liable to be prosecuted and punished under either statutory provision or, as the case may be, under the statutory provision or the common law, but shall not be liable to more than one punishment for the act or omission constituting the offence.

337. Estimating age of person.—If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless—

- (a) it is subsequently proved that the said estimate was incorrect; and
- (b) the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.

338. Production of document by accused in criminal proceedings.—Where any law requires any person to produce any document at any criminal proceedings at which such person is an accused, and such person fails to produce such document at such proceedings, such person shall be guilty of an offence, and the court may in a summary manner enquire into his failure to produce the document and, unless such person satisfies the court that his failure was not due to any fault on his part, sentence him to any punishment provided for in such law, or, if no punishment is so provided, to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[S. 338 substituted by s. 24 of Act No. 33 of 1986.]

Wording of Sections

339. Removal of accused from one prison to another for purpose of attending at criminal proceedings.—Whenever an accused is in custody and it becomes necessary that he be removed from one prison to another prison for the purpose of attending his trial, the magistrate of the district in which the accused is in custody shall issue a warrant for the removal of the accused to such other prison.

340. Prison list of unsentenced prisoners and witnesses detained.—Every head of a prison within the area for which any session or circuit of any superior court is held for the trial of criminal cases shall deliver to that court at the commencement of each such session or circuit a list—

- (a) of the unsentenced prisoners who, at such commencement, have been detained within his prison for a period of ninety days or longer; and
- (b) of witnesses detained under section 184 or 185 and who, at such commencement, are being detained within his prison,

and such list shall, in the case of each such prisoner and each such witness, specify the date of his admission to the prison and the authority for his detention which shall, in the case of a witness, state whether the detention is under section 184 or 185, and shall further specify, in the case of each such prisoner, the cause of his detention.

341. Compounding of certain minor offences.—(1) If a person receives from any peace officer a notification in writing alleging that such person has committed, at a place and upon a date and at a time or during a period specified in the notification, any offence likewise specified, of any class mentioned in Schedule 3, and setting forth the amount of the fine which a court trying such person for such offence would probably impose upon him, such person may within thirty days after the receipt of the notification deliver or transmit the notification, together with a sum of money equal to the said amount, to the magistrate of the district or area wherein the offence is alleged to have been committed, and thereupon such person shall not be prosecuted for having committed such offence.

(2) (a) Where a notification referred to in subsection (1) is issued by a peace officer in the service of a local authority in respect of an offence committed within the area of jurisdiction of such local authority, any person receiving the notification may deliver or transmit it together with a sum of

money equal to the amount specified therein to such local authority.

[Para. (a) substituted by s. 9 of Act No. 64 of 1982.]

Wording of Sections

(b) Any sum of money paid to a local authority as provided in paragraph (a) shall be deemed to be a fine imposed in respect of the offence in question.

[Para. (b) substituted by s. 9 of Act No. 64 of 1982.]

Wording of Sections

(c) Not later than seven days after receipt of any sum of money as provided in paragraph (a), the local authority concerned shall forward to the magistrate of the district or area wherein the offence is alleged to have been committed a copy of the notification relating to the payment in question.

(d) If the magistrate finds that the amount specified in the notification exceeds the amount determined in terms of subsection (5) in respect of the offence in question, he shall notify the local authority of the amount whereby the amount specified in the notification exceeds the amount so determined and the local authority concerned shall immediately refund the amount of such excess to the person concerned.

(e) For the purposes of this subsection “local authority” means any institution or body contemplated in Act section 84 (1) (f) of the Provincial Government Act, 1961 (Act Act 32 of 1961), and includes—

- (i) a regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act 109 of 1985);
- (ii) any institution or body established under the Rural Areas Act (House of Representatives), 1987 (Act Act No. 9 of 1987), of the Coloured Persons Representative Council of the Republic of South Africa;

[Sub-para. (ii) amended by s. 4 of Act No. 18 of 1996.]

Wording of Sections

- (iii) a local authority as defined in Act section 1 of the Black Local Authorities Act, 1982 (Act Act 102 of 1982);
- (iv) a local government body contemplated in section 30 (2) (a) of the Black Administration Act, 1927 (Act 38 of 1927); and
- (v) any committee referred to in section 17 (1) of the Promotion of Local Government Affairs Act, 1983 (Act 91 of 1983).

[Para. (e) substituted by s. 25 of Act No. 33 of 1986 and by s. 16 of Act No. 26 of 1987.]

Wording of Sections

(3) Any money paid to a magistrate in terms of subsection (1) shall be dealt with as if it had been paid as a fine for the offence in question.

(4) The Minister may from time to time by notice in the *Gazette* add any offence to the offences mentioned in Schedule 3, or remove therefrom any offence mentioned therein.

(5) The amount to be specified in any notification issued under this section as the amount of the fine which a court would probably impose in respect of any offence, shall be determined from time to time for any particular area by the magistrate of the district or area in which such area is situated, and may differ from the admission of guilt fine determined under section 57 (5) (a) for the offence in question.

342. Conviction or acquittal no bar to civil action for damages.—A conviction or an acquittal in respect of any offence shall not bar a civil action for damages at the instance of any

person who has suffered damages in consequence of the commission of that offence.

342A. Unreasonable delays in trials.—(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

- (a) The duration of the delay;
- (b) the reasons advanced for the delay;
- (c) whether any person can be blamed for the delay;
- (d) the effect of the delay on the personal circumstances of the accused and witnesses;
- (e) the seriousness, extent or complexity of the charge or charges;
- (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
- (g) the effect of the delay on the administration of justice;
- (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
- (i) any other factor which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order—

- (a) refusing further postponement of the proceedings;
- (b) granting a postponement subject to any such conditions as the court may determine;
- (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general;
- (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
- (e) that—
 - (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
 - (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or

(Date of commencement of para. (e) to be proclaimed)

- (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

(4) (a) An order contemplated in subsection (3) (a), where the accused has pleaded to the charge, and an order contemplated in subsection (3) (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.

(b) The attorney-general and the accused may appeal against an order contemplated in subsection (3) (d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply *mutatis mutandis*.

(5) Where the court has made an order contemplated in subsection (3) (e)—

(a) the costs shall be taxed according to the scale the court deems fit; and

(b) the order shall have the effect of a civil judgment of that court.

(Date of commencement of sub-s. (5) to be proclaimed)

(6) If, on notice of motion, it appears to a superior court that the institution or continuance of criminal proceedings is being delayed unreasonably in a lower court which is seized with a case but does not have jurisdiction to try the case, that superior court may, with regard to such proceedings, institute the investigation contemplated in subsections (1) and (2) and issue any order contemplated in subsection (3) to the extent that it is applicable.

[S. 342A inserted by s. 13 of Act No. 86 of 1996.]

343.

[S. 343 repealed by s. 1 of Act No. 49 of 1996.]

Wording of Sections

344. Repeal of laws.—(1) Subject to the provisions of subsection (2), the laws specified in Schedule 4 are hereby repealed to the extent set out in the third column of that Schedule.

(2) Any regulation, rule, notice, approval, authority, return, certificate, document, direction or appointment made, issued, given or granted, and any other act done under any provision of any law repealed by this Act shall, subject to the provisions of subsection (3), be deemed to have been made, issued, given, granted or done under the corresponding provisions of this Act.

(3) Notwithstanding the repeal of any law under subsection (1), criminal proceedings which have under such law at the date of commencement of this Act been commenced in any superior court, regional court or magistrate's court and in which evidence has at such date been led in respect of the relevant charge, shall, if such proceedings have at that date not been concluded, be continued and concluded under such law as if it had not been repealed.

345. Short title and date of commencement.—(1) This Act shall be called the Criminal Procedure Act, 1977, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

(2) The State President may under subsection (1) fix different dates in respect of different provisions of this Act.

[Sub-s. (2) amended by s. 1 of Act No. 49 of 1996.]

Wording of Sections

Schedule 1

(Sections 40 and 42)

[Schedule 1 substituted by s. 17 of Act No. 26 of 1987. Heading substituted by s. 8 of Act No. 122 of 1998.]

Wording of Sections

[Editorial Note: The common-law offence of sodomy in Schedule 1 has been declared inconsistent with the provisions of the Constitution and invalid to the extent set out in the Constitutional Court Order published under Government Notice No. R.1354 in *Government Gazette* 19349 of 23 October, 1998 and Government Notice No. R.588 in *Government Gazette* 21266 of 15 June, 2000.]

Treason.

Sedition.

Public violence.

Murder.

Culpable homicide.

Rape.

Indecent assault.

Sodomy.

Bestiality.

Robbery.

Kidnapping.

Childstealing.

Assault, when a dangerous wound is inflicted.

Arson.

Malicious injury to property.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision.

Receiving stolen property knowing it to have been stolen.

Fraud.

Forgery or uttering a forged document knowing it to have been forged. Offences relating to the coinage.

Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.

Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Schedule 2

[Schedule 2 amended by s. 5 of Act No. 126 of 1992 and by s. 15 (a) and (b) of Act No. 62 of

2000.] Wording of

Sections **PART I**

(Section 35)

Any offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs or intoxicating liquor.

Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision.

PART II

(Sections 59, 72)

Treason.

Sedition.

Murder.

Rape.

Robbery.

Assault, when a dangerous wound is inflicted.

Arson.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500.

Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones.

Any offence under any law relating to the illicit—

- (a) possession of—
 - (i) dagga exceeding 115 grams; or
 - (ii) any other dependence-producing drugs; or
- (b) conveyance or supply of dependence-producing drugs.

Any offence relating to the coinage.

Any conspiracy, incitement or attempt to commit any offence referred to in this Part.

PART III

(Sections 59, 61, 72, 184, 185, 189)

Sedition.

Public violence.

Arson.

Murder.

Kidnapping.

Childstealing.

Robbery.

Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence.

Contravention of the provisions of sections 1 and 1A of the Intimidation Act, 1982 (Act No. 72 of 1982).

Any conspiracy, incitement or attempt to commit any of the above-mentioned offences.

Treason.

Schedule 3

(Section 341)

[Schedule 3 as amended by s. 18 of Act No. 56 of 1979.]

Wording of Sections

Any contravention of a by-law or regulation made by or for any council, board or committee established in terms of any law for the management of the affairs of any division, city, town, borough, village or other similar community.

Any offence committed by—

- (a) driving a vehicle at a speed exceeding a prescribed limit;
- (b) driving a vehicle which does not bear prescribed lights, or any prescribed means of identification;
- (c) leaving or stopping a vehicle at a place where it may not be left or stopped, or leaving a vehicle in a condition in which it may not be left;
- (d) driving a vehicle at a place where and at a time when it may not be driven;
- (e) driving a vehicle which is defective or any part whereof is not properly adjusted, or causing any undue noise by means of a motor vehicle;
- (f) owning or driving a vehicle for which no valid licence is held;
- (g) driving a motor vehicle without holding a licence to drive it.

Schedule 4

LAWS REPEALED

<i>No. and Year of Law</i>	<i>Title</i>	<i>Extent of Repeal</i>
	REPUBLIC	
Act 38 of 1916	Mental Disorders Act, 1916.....	Sections 27,28,29 and 29bis.
Act 24 of 1922	South-West Africa Affairs Act, 1922.....	Section 2(1), so much of section 3 as is unrepealed, and sections 4, 6 and 7.

Act 22 of 1926	South-West Africa Mental Disorders Act, 1926.....	So much as is unrepealed.
Act 46 of 1935	General Law Amendment Act, 1935..	Section 78 and so much of section 101 as is unrepealed.
Act 32 of 1944	Magistrates' Courts Act, 1944.....	Sections 93, 93 <i>bis</i> and 94 to 105 inclusive.
Act 32 of 1952	General Law Amendment Act, 1952..	Section 9 and so much of section 26 as is unrepealed.
Act 40 of 1952	Magistrates' Courts Amendment Act, 1952.....	Sections 22 to 26 inclusive.
Act 56 of 1955	Criminal Procedure Act, 1955.....	The whole, except sections 319 (3) and 384.
Act 62 of 1955	General Law Amendment Act, 1955..	Sections 13, 24, 25 and 26.
Act 50 of 1956	General Law Amendment Act, 1956..	Sections 22, 23, 24, 25, 27, 28, 29 and 31.
Act 33 of 1957	Interpretation Act, 1957.....	Section 9.
Act 68 of 1957	General Law Amendment Act, 1957..	Section 5 in so far as it relates to criminal proceedings, and sections 40 and 45 to 59 inclusive.
Act 9 of 1958	Criminal Procedure Amendment Act, 1958.....	The whole.
Act 18 of 1958	Special Criminal Courts Amendment Act, 1958.....	The whole.
Act 16 of 1959	Criminal Law Amendment Act, 1959.....	Sections 3 to 8 inclusive, 10, 11 and 15 to 49 inclusive.
Act 75 of 1959	Criminal Law Further Amendment Act, 1959.....	Sections 3 to 6 inclusive.
Act 33 of 1960	Children's Act, 1960.....	Sections 98 to 102 inclusive.
Act 39 of 1961	General Law Amendment Act, 1961..	Section 4.
Act 45 of 1961	Interpretation Amendment Act, 1961.....	Section 3.
Act 14 of 1962	Evidence Act, 1962.....	So much as is unrepealed.
Act 76 of 1962	General Law Amendment Act, 1962..	Sections 17 and 18.
Act 93 of 1962	General Law Further Amendment Act, 1962.....	Sections 28 and 29.

Act 19 of 1963	Magistrates' Courts Amendment Act, 1963.....	Sections 16 to 20 inclusive.
Act 37 of 1963	General Law Amendment Act, 1963..	Sections 1, 2 and 8 to 12 inclusive.
Act 92 of 1963	Criminal Procedure Amendment Act, 1963.....	So much as is unrepealed.
Act 93 of 1963	General Law Further Amendment Act, 1963.....	Sections 10 to 15 inclusive.
Act 80 of 1964	General Law Amendment Act, 1964..	Sections 12 and 22 to 30 inclusive.
Act 16 of 1965	Prevention of Counterfeiting of Currency Act, 1965	Section 10.
Act 25 of 1965	Civil Proceedings Evidence Act, 1965.....	The amendment of section 261 of the Criminal Procedure Act, 1955, contained in the Schedule.
Act 96 of 1965	Criminal Procedure Amendment Act, 1965.....	So much as is unrepealed.
Act 62 of 1966	General Law Amendment Act, 1966..	Sections 7, 8 and 9.
Act 102 of 1967	General Law Amendment Act, 1967..	Sections 7 to 12 inclusive.
Act 9 of 1968	Criminal Procedure Amendment Act, 1968.....	The whole.
Act 70 of 1968	General Law Amendment Act, 1968..	Sections 31 and 37 to 41 inclusive.
Act 15 of 1969	Establishment of the Northern Cape Division of the Supreme Court of South Africa Act, 1969.....	Sections 17 and 18.
Act 17 of 1969	Magistrates' Courts Amendment Act, 1969.....	Section 4.
Act 34 of 1969	Abolition of Juries Act, 1969.....	Sections 1 to 32 inclusive.
Act 101 of 1969	General Law Amendment Act, 1969..	Sections 5, 6, 7, 8 and 9.
Act 53 of 1970	Magistrates' Courts Amendment Act, 1970.....	Section 18.
Act 92 of 1970	General Law Further Amendment Act, 1970.....	Sections 4 and 14.
Act 41 of 1971	Abuse of Dependence-producing Substances.....	Section 62.
	and Rehabilitation Centres Act, 1971.....	
Act 102 of 1972	General Law Amendment Act, 1972..	Section 9.

Act 32 of 1974	Criminal Procedure Amendment Act, 1974.....	The whole.
Act 33 of 1975	Criminal Procedure Amendment Act, 1975.....	The whole.
Act 79 of 1976	Internal Security Amendment Act, 1976.....	Section 11.
	SOUTH WEST AFRICA	
Proclamation 26 of 1920	The Fugitive Offenders and Neighbouring Territories Evidence Proclamation, 1920.....	In so far as it relates to the attendance by witnesses of criminal proceedings in courts in the Republic.
Proclamation 30 of 1935	Criminal Procedure and Evidence Proclamation, 1935.....	In so far as it applies to the Eastern Caprivi Zipfel.
Proclamation 8 of 1938	Procedure and Evidence Proclamation, 1938.....	Section 3 in so far as it relates to criminal proceedings.
Ordinance 34 of 1963	Criminal Procedure Ordinance, 1963	The whole, except sections 300 (3) and 370.
Ordinance 35 of 1965	Criminal Procedure Amendment Ordinance, 1965.....	The whole.
Ordinance 19 of 1966	Criminal Procedure Amendment Ordinance, 1966.....	The whole.
Ordinance 19 of 1967	Criminal Procedure Amendment Ordinance, 1967.....	The whole.
Ordinance 4 of 1968	General Law Amendment Ordinance, 1968.....	Sections 5 to 13 inclusive.
Ordinance 3 of 1969	Criminal Procedure Amendment Ordinance, 1969.....	The whole.
Ordinance 14 of 1975	Criminal Procedure Amendment Ordinance, 1975.....	The whole.

Schedule 5

(Sections 58 and 60 (11) and (11A) and Schedule 6)

[Schedule 5 added by s. 14 of Act No. 75 of 1995, substituted by s. 9 of Act No. 85 of 1997 and amended by s. 36 (1) of Act No. 12 of 2004.]

Wording of Sections

Treason.

Murder.

Attempted murder involving the infliction of grievous bodily harm.

Rape.

Any offence referred to in section 13 (*f*) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that—

- (a) the value of the dependence-producing substance in question is more than R50 000,00; or
- (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) the offence was committed by any law enforcement officer.

Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament.

Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 39 (2) (a) (i) of that Act.

Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004—

- (a) involving amounts of more than R500 000,00; or
- (b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) if it is alleged that the offence was committed by any law enforcement officer—
 - (i) involving amounts of more than R10 000,00; or
 - (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

Indecent assault on a child under the age of 16 years.

An offence referred to in Schedule 1—

- (a) and the accused has previously been convicted of an offence referred to in Schedule 1; or
- (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.

Schedule 6

(Sections 50 (6), 58 and 60 (11) and (11A))

[Schedule 6 added by s. 10 of Act No. 85 of 1997.]

Murder, when—

- (a) it was planned or premeditated;
- (b) the victim was—
 - (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or
 - (ii) a person who has given or was likely to give material evidence with reference to

any offence referred to in Schedule 1;

- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:
 - (i) Rape; or
 - (ii) robbery with aggravating circumstances; or
- (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape—

- (a) when committed—
 - (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who is charged with having committed two or more offences of rape; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim—
 - (i) is a girl under the age of 16 years;
 - (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
 - (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973);
- (c) involving the infliction of grievous bodily harm.

Robbery, involving—

- (a) the use by the accused or any co-perpetrators or participants of a firearm;
- (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or
- (c) the taking of a motor vehicle.

Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.

An offence referred to in Schedule 5—

- (a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or
- (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule.

Schedule 7

(Section 59A)

[Schedule 7 added by s. 10 of Act No. 85 of 1997, amended by s. 10 of Act No. 34 of 1998 and by s. 16 of Act No. 62 of 2000.]

Wording of Sections

Public violence.

Culpable homicide.

Bestiality.

Assault, involving the infliction of grievous bodily harm.

Arson.

Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence.

Malicious injury to property.

Robbery, other than a robbery with aggravating circumstances, if the amount involved in the offence does not exceed R20 000,00.

Theft and any offence referred to in section 264 (1) (a), (b) and (c), if the amount involved in the offence does not exceed R20 000,00.

Any offence in terms of any law relating to the illicit possession of dependence-producing drugs.

Any offence relating to extortion, fraud, forgery or uttering if the amount of value involved in the offence does not exceed R20 000,00.

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

CRIMINAL PROCEDURE ACT
51 OF 1977

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REGULATIONS

GNR.1396 of 22 July 1977: Regulations under section 334

DECLARATION OF PERSONS AS PEACE OFFICERS IN TERMS OF SECTION 334 OF THE
CRIMINAL PROCEDURE ACT, 1977 (ACT 51 OF 1977)

Note—These regulations were published in Government Notice R1396 in Regulation Gazette 2498 of 22 July, 1977 and amended by:

University of Cape Town

GN R159	RG2738	2/2/79	
GN R1749	RG3605	12/8/83	
GN R500	RG3806	8/3/85	
GN R684	RG3812	29/3/85	
GN R685	RG3812	29/3/85	
GN R1281	RG3838	14/6/85	
GN R1845	RG3856	23/8/85	
GN R2227	RG3877	4/10/85	
GN R2597	RG3899	22/11/85	
GN R4	RG3913	3/1/86	
GN R950	RG3953	23/5/86	
GN R1315	RG4096	19/6/87	
GN R2697	RG4156	4/12/87	
GN R1860	RG4260	16/9/88	
GN R550	RG4335	31/3/89	
GN R1620	RG4399	21/7/89	
GN R543	GG12341	16/3/90	
GN R731	GG12377	30/3/90	
GN R1853	GG12614	10/8/90	
GN R2229	GG12751	21/9/90	
GN R2483	GG12805	26/10/90	
GN R1966	GG14157	17/7/92	
GN R1967	GG14157	17/7/92	
GN R2270	GG14213	14/8/92	
GN R2599	GG14280	18/9/92	
GN R2600	GG14280	18/9/92	
GN R2828	GG14325	9/10/92	
GN R3220	GG14425	27/11/92	
GN R3247	GG14438	4/12/92	
GN R1170	GG14903	2/7/93	
GN R1890	GG15151	8/10/93	
GN R2204	GG15265	19/11/93	
GN R2285	GG15291	3/12/93	
GN R2462	GG15362	24/12/93	
GN R752	GG15639	22/4/94	
GN R1128	GG15820	1/7/94	
GN R841	GG16474	15/6/95	
GN R1295	GG16622	25/8/95	
GN R1410	GG19435	30/10/98	wef 1/11/98
GN R709	GG21383	14/7/2000	
GN R469	GG22324	1/6/2001	
GN R1403	GG22972	20/12/2001	
GN R1404	GG22972	20/12/2001	
GN R153	GG23101	7/02/2002	Withdrawn by GN R209 of 2002
GN R154	GG23101	7/02/2002	Withdrawn by GN R209 of 2002
GN R209	GG23143	19/02/2002	as amended by GN R1201 of 2002
GNR.239	GG24393	14/02/2003	

I, PENUELL MPAPA MADUNA, Minister for Justice and Constitutional Development acting under and by virtue of the powers vested in me—

(1) by section 334 (1) (a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), hereby declare that every person who, by virtue of his/her office, falls within any category defined in column 1 of the Schedule to this notice, shall, within the area specified in column 2 of that Schedule, be a peace officer for the purpose of exercising, with reference to the offences specified in column 3 of the Schedule, the powers defined in column 4 thereof;

(2) hereby withdraw Government Notice No. R23101 of 7 February 2002.

DR P M MADUNA, MP

Minister for Justice and Constitutional Development

SCHEDULE

Column 1	Column 2	Column 3	Column 4
<p>PART 1</p> <p>Chiefs or headmen recognised or appointed in terms of section 2 (7) and (8) of the Black Administration Act, 1927 (Act No. 38 of 1927).</p>	<p>The area of the tribe of which he is a chief or headman.</p>	<p>The offences referred to in section 40 of the Criminal Procedure Act, 1977, but excluding the offences mentioned in the Third Schedule to the Black Administration Act, 1927.</p>	<p>The arrest without warrant of any person in terms of section of the Criminal Procedure Act, 1977. The powers conferred upon a police officer in terms of section 37 (a) (i) of the Criminal Procedure Act, 1977.</p> <p>(i) The arrest without warrant of a person in terms of section 40 of the Criminal Procedure Act, 1977;</p> <p>(ii) The execution of warrants of arrest in terms of section 44 of the Criminal Procedure Act, 1977.</p>
<p>PART 2</p>			

Immigration officers appointed under section 3 of the Aliens Control Act, 1991 (Act No. 96 of 1991), or who are deemed to be so appointed.

The Republic of South Africa

- (1) Any offence in terms of the Aliens Control Act, 1991 (Act No. 96 of 1991).
- (2) Any offence in terms of the Refugees Act, 1998 (Act No. 130 of 1998).
- (3) Any offence in terms of the Identification Act, 1997 (Act No. 68 of 1997).
- (4) Any offence in terms of the South African Citizenship Act, 1995 (Act No. 88 of 1995).
- (5) Any offence in terms of the South African Passport and Travel Documents Act, 1994 (Act No. 4 of 1994).

1. The arrest with warrant of any person in terms of section (1), (a), (b), (c) of the Criminal Procedure Act, 1977.
2. The issue of warrants in terms of section 56 of the Criminal Procedure Act, 1977.
3. The execution of warrants of arrest in terms of Section 4 of the Criminal Procedure Act, 1977.

PART 3

A member of a police force referred to in section 83 of the Durban Extended Powers Consolidated Ordinance, 1976 (Ordinance 18 of 1976) (Natal).

The area of jurisdiction of the Durban Transitional Metropolitan Council and in respect of the powers conferred upon a peace officer under section 44 of the Criminal Procedure Act, 1977, of the Republic of South Africa.

Any offence

All powers conferred upon a peace officer or a police official in terms of the Criminal Procedure Act, 1977.

PART 4

(a) A traffic officer appointed by a provincial government in terms of section 3 of the Road Traffic Act, 1989 (Act No. 29 of 1989).

Area of jurisdiction of the provincial government that appointed the traffic officer concerned: Provided that in the event of hot pursuit into the area of jurisdiction of another provincial government of another province, the area is extended to cover the whole area in which the pursuit takes place.

Any offence

- (i) All powers conferred upon peace officers in terms of the Criminal Procedure Act 1977.
- (ii) All powers conferred upon police officers in terms of the Criminal Procedure Act 1977, excluding the powers provided for in terms of sections 25, 59 and (1) (b): Provided that the powers conferred upon police officers in terms of section 72 of the Criminal Procedure Act 1977, may be exercised for the purpose contemplated in section 55 of the Criminal Procedure Act 1977.

<p>(c) Nature conservation officers or authorised officers appointed in terms of—</p> <ul style="list-style-type: none"> (i) section 4 of the Nature Conservation Ordinance, 1983 (Ordinance 12 of 1983) (Transvaal); (ii) section 39 of the Nature Conservation Ordinance, 1969 (Ordinance 8 of 1969) (Orange Free State); (iii) section 20 of the Nature Conservation Ordinance, 1974 (Ordinance 19 of 1974) (Cape); (iv) section 3 of the Prohibition of the Dumping of Rubbish Ordinance, 1976 (Ordinance 8 of 1976) (Orange Free State); (v) section 11 (10) (a) of the Nature Conservation Ordinance, 1974 (Ordinance 15 of 1974) (Natal). 	<p>The area of jurisdiction of the Provincial Administration which made the appointment.</p>	<p>Any offence in terms of the—</p> <ul style="list-style-type: none"> (i) Nature Conservation Ordinance, 1983 (Ordinance 12 of 1983) (Transvaal); (ii) Nature Conservation Ordinance, 1969 (Ordinance 19 of 1969) (Orange Free State); (iii) Nature Conservation Ordinance, 1974 (Ordinance 19 of 1974) (Cape); (iv) Prohibition of the Dumping of Rubbish Ordinance, 1976 (Ordinance 8 of 1976) (Orange Free State); (v) the Nature Conservation Ordinance, 1974 (Ordinance 15 of 1974) (Natal). 	<ul style="list-style-type: none"> (i) The arrest warrant of a person in terms of section 40 (1) of the Criminal Procedure Act, 1977. (ii) The execution warrants of a person in terms of section 44 of the Criminal Procedure Act, 1977. (iii) The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977.
<p>(d) Officers appointed in terms of section 24 of the Public Resorts Ordinance, 1969 (Ordinance 18 of 1969) (Transvaal).</p>	<p>The area of jurisdiction of a public resort which has, in terms of section 5 (1) (a) of the Public Resorts Ordinance, 1969 (Ordinance 18 of 1969) (Transvaal), been placed under the supervision of the Board for Public Resorts.</p>	<p>Any offence in terms of the Public Resorts Ordinance, 1969 (Ordinance 18 of 1969) (Transvaal).</p>	<p>The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977.</p>

(e) Officers who are employed by the Western Cape, Gauteng, Kwazulu/Natal, Northern Province, North Cape, North West, Eastern Cape, Mpumalanga and Free State Province and who perform security duties at provincial hospitals or related institutions.

The area of jurisdiction of the Province which made the appointment.

(1) Any offence in terms of the—

- (i) Hospitals Ordinance, 1946 (Ordinance 18 of 1946) (Cape);
- (ii) Provincial Hospitals Ordinance, 1961 (Ordinance 13 of 1961) (Natal);
- (iii) Free State Hospitals Act, 1996 (Act No. 13 of 1996);
- (iv) Control of Traffic on Administration Grounds Ordinance, 1965 (Ordinance 15 of 1965) (Orange Free State);
- (v) Hospitals: Ordinance, 1958 (Ordinance 14 of 1958) (Transvaal).

(2) An offence referred to in section 40 (1) (a), (b), (c), (d), (e), (f), (g), (h) and (j) of the Criminal Procedure Act, 1977

(i) The issue of written notices in of section 56 of the Criminal Procedure Act, 1977.

(ii) The arrest without warrant of person in terms of section 40 (1) (a), (c), (d), (e), (f), (g) and (j) of the Criminal Procedure Act, 1977.

<p>(a) Law enforcement officers appointed by a municipality</p>	<p>The area of jurisdiction of the municipality which made the appointment and in respect of the power mentioned in item (iii) and (iv) of Column 4 of paragraph (a) of this Part, the Republic of South Africa.</p>	<p>Any offence in terms of—</p> <ul style="list-style-type: none"> (i) a by-law or regulation made by or for such municipality; (ii) the Business Act, 1991 (Act No. 71 of 1991); (iii) the Occupational Health and Safety Act, 1993 (Act No. 6 of 1993); (iv) the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977), in respect of which section 24 of the said Act applies; (v) the Fire Brigade Services Act, 1987 (Act No. 99 of 1987), and any bylaws or regulations made thereunder; (vi) the Town Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986) (Transvaal); (vii) the Townships Ordinance, 1969 (Ordinance 9 of 1969) (Orange Free State); (viii) the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) (Cape); (ix) the Town Planning Ordinance, 1949 (Ordinance 27 of 1949) (Natal); (x) Section 154 (1) (b)-(d) and 154 (1) (f) of the Liquor Act, 1989 (Act No. 27 of 1989); (xi) sections 4 and 5 of the Drugs and Drug Trafficking Act, No. 1992 (Act 140 of 1992); 	<ul style="list-style-type: none"> (i) The issue of written notice terms of section 341 of the Criminal Procedure Act 1977. (ii) The issue of written notice terms of section 56 of the Criminal Procedure Act 1977. (iii) The execution warrants of a in terms of sections 44 (2) of the Criminal Procedure Act 1977. (iv) The powers conferred upon peace officer terms of section 41 (1) of the Criminal Procedure Act 1977. (v) In respect of offences mentioned in items (iii) up and including of column 3, arrest, without warrant of somebody in terms of section 40 (1) (a), (f), (h) and the Criminal Procedure Act 1977.
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<p>(b) Traffic officers or inspectors of licences appointed by a local authority in terms of section 3 of the Road Traffic Act, 1989 (Act No. 29 of 1989).</p>	<p>Area of jurisdiction of the municipality that appointed the traffic officer or inspector concerned: Provided that in the event of hot pursuit into the area of jurisdiction of another municipality, the area is extended to cover the whole area in which the pursuit takes place.</p>	<p>Any offence.</p>	<p>(i) All powers conferred upon peace officer in terms of the Criminal Procedure Act 1977.</p> <p>(ii) All powers conferred upon police official in terms of the Criminal Procedure Act 1977, excluding the powers provided for in terms of sections 25, 59 and 1 (b): Provided the power conferred upon police official in terms of section 72 of the Criminal Procedure Act 1977, may also be exercised for the purposes contemplated in section 55 (2) of the Criminal Procedure Act 1977.</p>
<p>(c) Traffic wardens appointed under section 3 (1) of the Road Traffic Act, 1989 (Act No. 29 of 1989)</p>	<p>(i) In respect of an appointment made by the Administrator in terms of section 3 (1) (a) of the Road Traffic Act, 1989, the area of the province concerned;</p> <p>(ii) In respect of an appointment made by a municipality in terms of section 3 (1) (d) of the Road Traffic Act, 1989, the area of the municipality concerned.</p>	<p>Offences referred to in sections 12, 14 (2), 83 (12), 84, 97, 98, 110, 116 (a) read with subparagraph (i) and 125 of the Road Traffic Act, 1989, and regulations 206 (1) to (7), 207 (1) to (4), 223, 224 (1), 224 (3) (a) and (b), 225 (2) to (6), 227 (1), 228, 319 to 325, 337, 340, 341 and 347 of the regulations made thereunder.</p>	<p>(i) The issue of written notice in terms of section 56 of the Criminal Procedure Act 1977.</p> <p>(ii) The issue of written notice in terms of section 341 of the Criminal Procedure Act 1977.</p> <p>(iii) The powers conferred upon peace officer in section 41 (1) of the Criminal Procedure Act 1977.</p>

Officers appointed in terms of section 14 (1) of the National Parks Act, 1976 (Act No. 57 of 1976)	The area of jurisdiction of a proclaimed national park under the control of the South African National Parks in respect of which the appointment has been made	Any offence in terms of the National Parks Act, 1976 (Act No. 57 of 1976)	The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977.
PART 7			
Inspectors appointed in terms of section 98 (1) of the Telecommunications Act, 1996 (Act No. 103 of 1996)	The Republic of South Africa	Any offence in terms of the Telecommunications Act, 1996 (Act No. 103 of 1996), and any regulations issued thereunder	The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977.
PART 8			
National road transport inspectors appointed under section 37 of the Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998)	The Republic of South Africa	<ul style="list-style-type: none"> (i) Any offence in terms of the Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998) and the regulations issued thereunder (ii) Any offence in terms of the Road Transportation Act No. 74 of 1977, and the regulations issued thereunder (iii) Any offence in terms of the National Road Traffic Act 1996 (Act No. 93 of 1996) and any regulations issued thereunder (iv) Any offence in terms of the Tourism Act, 1993 (Act No. 72 of 1993), and any regulations issued thereunder. 	<ul style="list-style-type: none"> (i) The issue of written notices in terms of section 56 of the Criminal Procedure Act 1977. (ii) The issue of written notices in terms of section 341 of the Criminal Procedure Act 1977. (iii) The arrest warrant of a person in terms of section 40 (1) of the Criminal Procedure Act 1977. (iv) The powers conferred upon a peace officer under section (1) of the Criminal Procedure Act 1977. (v) The execution of warrants in terms of section 44 of the Criminal Procedure Act 1977.
PART 9			

Sheriffs referred to in section 2 of the Sheriffs Act, 1986 (Act No. 90 of 1986)	The area of jurisdiction of the Court, or any other area, for which the appointment has been made.	Not applicable	The execution of a warrant of arrest i under any provisio the Criminal Proce Act, 1977 (Act N of 1977)
PART 10			
Officers appointed under section 69 (1) (b) of the Forest Act, 1984 (Act No. 122 of 1984)	Any national botanic garden mentioned in Schedule 1 to the Forest Act, 1984 (Act No. 122 of 1984)	Any offence in terms of the by-laws made under section 72 (1), read with section 61 (1) (f), of the Forest Act, 1984 (Act No. 122 of 1984)	The issue of writte notices under sect of the Criminal Procedure Act, 19 (Act No. 51 of 197
PART 11			
Authorised officers and inspectors appointed under the Aviation Act, 1962 (Act No. 74 of 1962)	The Republic of South Africa	Any offence contemplated in— (i) the Aviation Act 1962 (Act No. 74 of 1962), and any regulation made thereunder; (ii) the Air Services Licensing Act, 1990 (Act No. 115 of 1990), and any regulation made thereunder; (iii) the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972), and any regulation made thereunder; and (iv) the International Air Services Act, 1949 (Act No. 51 of 1949), and any regulation made thereunder.	(i) The issue of written notic under section of the Crimin Procedure A 1977. (ii) The executio warrants of a under section of the Crimin Procedure A 1977. (iii) The arrest w a warrant of person under section 40 (1 and (j) of th Criminal Procedure A 1977.
PART 12			
A regional director appointed in terms of section 4 of the Minerals Act, 1991 (Act No. 50 of 1991), and officers in the service of the Department of Mineral and Energy Affairs in the office of such regional director who hold the position of an assistant director or an equal or a higher position.	The area of jurisdiction of the regional director referred to in column 1 of this Part.	Any offences in terms of the Minerals Act, 1991, and any regulation issued thereunder or in force in terms of section 68 (2) thereof.	The issue of writte notices in terms of section 56 of the Criminal Procedur Act, 1977.

PART 13

A police officer of the East London City Police appointed in terms of section 60 (1) of the Municipal Ordinance, 1974 (Ordinance 20 of 1974) (Cape)

The area of jurisdiction of the City of East London and in respect of powers conferred upon a peace officer under section 44 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the Republic of South Africa

- (a) Any offence contemplated in—
- (i) any municipal by-law of the City of East London
 - (ii) Schedule I to the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
 - (iii) the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992);
 - (iv) the Indecent or Obscene Photographic Matter Act, 1967 (Act No. 37 of 1967);
 - (v) the Child Care Act, 1983 (Act No. 74 of 1983);
 - (vi) the Sexual Offences Act, 1957 (Act No. 23 of 1957);
 - (vii) the Animals Protection Act, 1962 (Act No. 71 of 1962)
 - (viii) the Liquor Act, 1989 (Act No. 27 of 1989);
 - (ix) the Dangerous Weapons Act, 1968 (Act No. 71 of 1968);
 - (x) the Explosives Act, 1956 (Act No. 26 of 1956); and
- (b) any of the following offences: *Crimen injuria*, public indecency, malicious injury to property and possession of stolen property.

All the powers conferred upon a police officer or police officer in terms of the Criminal Procedure Act, 1977 except the powers referred to in sections 25, 43, 59, 179 (1) and 329.

PART 14

Inspectors appointed in terms of section 3 (d) of the Security Officers Act, 1987 (Act No. 92 of 1987)	The Republic of South Africa	Any offence in terms of the Security Officers Act, 1987 (Act No. 92 of 1987)	The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977.
PART 15			
Inspectors appointed in terms of section 3 (d) of the Security Officers Act, 1987 (Act No. 92 of 1987)	The Republic of South Africa	Any offence in terms of the Security Officers Act, 1987 (Act No. 92 of 1987)	The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977.
(Please note that Part 14 is repeated in Part 15. This is in accordance with <i>Government Gazette</i> 23143.)			
PART 16			

University of Cape Town

Persons assigned in terms of section 7 (4) (a) (iii), (iv) and (v) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), as investigating officers for the Special Investigating Directorate: Organised Crime and Public Safety.

The Republic of South Africa

- (a) Any offence of—
- (i) murder;
 - (ii) fraud;
 - (iii) theft and any offence involving dishonesty;
 - (iv) robbery with aggravating circumstances;
 - (v) extortion;
 - (vi) kidnapping;
 - (vii) arson;
 - (viii) malicious injury to property;
 - (ix) breaking and entering any premises with the intent to commit an offence;
 - (x) public violence; or
- (b) any offence in contra-vention of the—
- (i) Explosives Act;
 - (ii) Income Tax Act;
 - (iii) Customs and Excise Act;
 - (iv) Armaments Development and Production Act;
 - (v) Arms and Ammunition Act;
 - (vi) Intimidation Act;
 - (vii) Internal Security Act;
 - (viii) Diamonds Act;
 - (ix) Sea Fishery Act;
 - (x) Corruption Act;
 - (xi) Drugs and Drug Trafficking Act;
 - (xii) Proceeds of Crime Act,
- committed in an organised fashion or which may endanger the safety or security of the public, or any conspiracy, incitement or attempt to commit any

- (a) The Powers conferred in terms of sections 40 (1), 44, 45 and of the Criminal Procedure Act 1977; and
- (b) the powers conferred upon police officers in terms of Chapter 1 of the Criminal Procedure Act 1977.

PART 17			
Safety Officers, Senior Security Officers and Safety Representatives appointed by the Airports Company South Africa Limited in terms of the Airports Company Act, 1993 (Act No. 44 of 1993)	The areas falling within the definition of "company airport" as defined in terms of section 1 of the Airports Company Act, 1993 (Act No. 44 of 1993)	(i) Any offence in terms of the National Road Traffic Act 1996 (Act No. 93 of 1996) and any regulations issued there under.	The issue of written notices in terms of section 56 of the Criminal Procedure Act, 1977

GNR.25 of 21 March 1986: Regulations prescribing the tariff of allowances payable to witnesses in criminal proceedings

NOTE⁵—These regulations were published in Government Notice No R525 contained in Regulation Gazette No 3933 on 21 March 1986 and amended by:

GN R662		27/3/87	wef 1/4/87
GN R732	GG 12377	30/3/90	wef 1/4/90
GN R2596	GG 13604	1/11/91	wef 1/11/91

The Minister of Justice has, in consultation with the Minister of Finance, under sections 191 (3) and 191 (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), made the regulations in the Schedule.

SCHEDULE

ARRANGEMENT OF REGULATIONS

1. Subsistence Allowance
2. Income Forfeited
3. Travelling Expenses and Transport
- 4-10. Supplementary Provisions

TARIFF OF ALLOWANCES

1. Subsistence Allowance.—(1) Any person who attends a criminal case as a witness for the State shall be entitled to the following allowances for each 24 hours or part thereof for which he is, for the purpose of such attendance, absent from his place of residence or sojourn:

(a) (i) A witness giving expert evidence: R50.

(ii) A witness giving expert evidence who of necessity has to hire accommodation for a night: In addition to the amount referred to in subparagraph (i), his reasonable actual subsistence expenses.

(b) (i) A witness, excluding a witness referred to in subparagraph (ii), who resides or sojourns more than 8 kilometres from the court where he appears: R10: Provided that, if a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa is satisfied that the witness had to incur expenses exceeding R10 in respect of such attendance, the witness may be paid his reasonable actual expenses.

(ii) A witness who of necessity has to hire accommodation for a night: His reasonable actual expenses.

(c) A witness who resides or sojourns 8 kilometres or less from the court where he appears, if a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa is satisfied that the witness had to incur expenses in respect of such attendance: His reasonable actual expenses.

(d) Subject to the provisions of regulation 6, the decision of a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa in respect of the amounts payable in terms of subparagraphs (a), (b) and (c) shall be final.

(2) A witness shall qualify for the allowance referred to in subregulation (1) (a) (ii) or (1) (b) (ii) for the full period for which he is absent from his place of residence or sojourn for the purpose of attending court, if during such absence he has to hire accommodation for a night or spend a night on a train.

2. Income Forfeited.—A judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa may, on satisfactory proof having been produced that a witness for the State has forfeited income as a result of his attendance of a criminal case, order that, in addition to any allowance that may be payable to the witness in terms of regulation 1, an allowance equal to the actual amount of income so forfeited be paid to him, subject to a maximum of R400 per day.

3. Travelling Expenses and Transport.—(1) (a) Whenever a witness makes use of railway transport to attend court, he shall be issued with a rail warrant for a return ticket for the class in which presumably he would ordinarily travel or such other class as a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa may deem appropriate, and the decision of a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa in this respect shall be final.

(b) Whenever a witness makes use of railway transport without a rail warrant having been issued to him, an amount equal to the fare at Government rate shall be paid to him: Provided that if a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa is satisfied that the payment of such amount would in any particular instance be unreasonable, he may order that an amount equal to the actual fare be paid to the witness.

(2) Whenever suitable railway transport is not available and a witness makes use of any other means of public transport to attend court, an amount equal to the fare for the forward and return journey along the shortest convenient route shall be paid to him: Provided that if more than one such other means of public transport is available, the fare for the least expensive thereof shall be paid.

(3) Whenever suitable public transport is not available and a witness makes use of his own or hired transport to attend court, an amount for the forward and return journey along the shortest convenient route shall be paid, calculated at 50c per kilometre in respect of a motor vehicle, excluding a motor cycle, and at 42c per kilometre in respect of a motor cycle or any other means of conveyance.

(4) Whenever suitable public transport is available and a witness makes use of his own or hired transport to attend court, the amount referred to in subregulation (3) may be paid for a forward and return journey not exceeding 300 kilometres: Provided that if a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa is satisfied that the circumstances in a particular instance justify the use of transport other than public transport for a distance in excess of 300 kilometres, he may order that the amount referred to in subregulation (3) or such lesser amount as he may deem equitable in the circumstances be paid for such longer distance, and the decision of a judicial officer or a registrar or assistant registrar of the Supreme Court of South Africa in this respect shall be final.

(5) If a judicial officer or a registrar of the Supreme Court of South Africa is satisfied that the

use of such transport is warranted, he may grant approval for a witness to make use of air transport at Government expense to attend court.

4. Supplementary Provisions.—In calculating the period of his absence for the purposes of regulation 1 a witness shall be allowed not more than 24 hours—

- (a) if he makes use of private transport, for each—
 - (i) 600 kilometres or part thereof if he travels by motor vehicle; or
 - (ii) 60 kilometres or part thereof if he travels by a means of transport other than a motor vehicle; or
- (b) if he travels on foot, for each 30 kilometres or part thereof.

5. Whenever the fare of a witness includes the cost of meals and sleeping accommodation, no allowance in terms of regulation 1 shall be paid.

6. The Director-General, a deputy director-general, a chief director, a director, a deputy director or the head of the accounts division of the Department of Justice may authorise a departure from the prescribed tariff in the case of a witness who resides outside the Republic of South Africa or in any other case, if he is satisfied that the application of the said provisions may cause a witness hardship.

7. Any person who attends more than one criminal case as a witness in the same court on the same day shall for the purposes of these regulations be deemed to have attended one criminal case only.

8. (1) These regulations shall not apply to a public servant or to an officer of the Department of Posts and Telecommunications.

(2) Where the expenses incurred by a witness for the State in connection with his attendance at a criminal case are provided for from any other source, no allowance in terms of these regulations shall be paid to him.

9. Government Notice R526 dated 21 March 1986, as amended by Government Notices R662 of 27 March 1987 and R732 of 30 March 1990, is repealed as from the first day of November 1991.

10. These regulations shall come into operation on the first day of November 1991.

GNR.2204 of 31 July 1992: Regulations Under Section 185A (5)

[Editorial Note: S. 309C was declared inconsistent with the Constitution and has been declared invalid. Please note that the invalidity of this section is suspended for a period of six months from the date of the Constitutional Court Order published under Government Notice No. R.1328 in *Government Gazette* 21830 of 8 December, 2000.]

NOTE:—These regulations were published in Government Notice R2204 in *Government Gazette* 14196 of 31 July 1992.

The Minister of Justice has, under section 185A (5) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), made the regulations in the Schedule.

SCHEDULE

ARRANGEMENT OF REGULATIONS

CHAPTER I GENERAL PROVISIONS

1. Definitions
2. Application and authorization for protective custody
3. Prohibition on disclosure of certain information
4. Transfer
5. Discharge from protective custody
6. Expenses in connection with protective custody

CHAPTER II DETENTION IN PROTECTIVE CUSTODY

7. Detention in place of safety
8. Search
9. Seizure
10. Disposal of private property of detainee
11. Orders to detainee
12. Duties of person in charge of place of safety
13. Access to detainee
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CHAPTER III PLACING UNDER PROTECTIVE CUSTODY

15. Placing under protective custody
16. Search
17. Seizure
18. Orders to protected person
19. Duties of commander
20. Complaints or requests by protected person
21. Access to protected person
22. Payment of allowances to protected person

CHAPTER IV OFFENCES AND PENALTIES

23. Offences and penalties

ANNEXURE

- | | |
|--------|--|
| Form A | Application by witness or prospective witness to be detained in or placed under protective custody |
| Form B | Authorization by witness or prospective witness to be detained in or placed under protective custody |
| Form C | Authorization by a member of the family or household or a dependant of a witness or prospective witness or of such a member to be detained in or placed under protective custody |

CHAPTER I GENERAL PROVISIONS

1. Definitions.—In these regulations any word or expression to which a meaning has been assigned in the Act shall bear that meaning, and unless the context otherwise indicates—

“**commander**” means the person who is in charge of the police station or prison and who has placed a protected person in custody or the person designated in terms of regulation 15 (2) (a) to deal with a placing;

“**detainee**” means a person detained in protective custody under section 185A (2) (a) (i) of the Act;

“**Director-General**” means the Director-General: Justice or an officer in the public service designated by him in general or for a particular matter;

“**medical officer**” means a medical officer as defined in section 1 of the Correctional Services Act, 1959 (Act No. 8 of 1959);

“**member**” means a member of the Force as defined in section 1 of the Police Act, 1958 (Act No. 7 of 1958), a member of the Correctional Services as referred to in section 2 (1) of the Correctional Services Act, 1959 (Act No. 8 of 1959), or a temporary warder appointed as such under section 9 (1) of the Correctional Services Act, 1959;

“**place of safety**” means a place referred to in regulation 7 where a detainee is detained in protective custody;

“**protected person**” means a person placed under protective custody under section 185A (2) (a) (ii) of the Act;

“**security officer**” means a person designated a security officer in terms of regulation 15; and

“**the Act**” means the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

2. Application and authorization for protective custody.—(1) Any witness or prospective witness referred to in section 185A (1) of the Act shall make application in the form of Form A in the Annexure for protective custody for himself, any member of his family or household, or any dependant of his or of such member.

(2) Any witness or prospective witness who has made application under subregulation (1) for protective custody for himself, or where such witness or prospective witness is a minor his parent or guardian, shall give authorization in the form of Form B in the Annexure for protective custody before he is detained in or placed under protective custody.

(3) Any member of the family or household of a witness or prospective witness or any dependant of such witness or prospective witness or member on behalf of whom application is made under subregulation (1) for protective custody, or where such member or dependant is a minor his parent or guardian, shall give authorization in the form of Form C in the Annexure for protective custody before he is detained in or placed under protective custody.

3. Prohibition on disclosure of certain information.—No person shall furnish any other person with any information that has the effect that—

- (a) the identity of any person who applied for protective custody or who gave authorization thereto or who is or was in protective custody; or
- (b) the place where a detainee or protected person is in protective custody, is disclosed, except with the permission of the attorney-general or for official purposes or for the purpose of judicial proceedings.

4. Transfer.—(1) (a) A detainee may at any time by or by order of the person in charge of the place of safety where he is being detained, in consultation with the attorney-general, be transferred to another place of safety or be transferred to a place where he is to be placed in protective custody.

(b) A protected person may at any time by or by order of the commander, in consultation with the attorney-general, be transferred to another place in protective custody or be transferred to a place of safety where he is to be detained in protective custody.

(2) (a) Any detainee transferred to a place where he is placed in protective custody in terms of subregulation 1(a) shall be deemed to be discharged from all the provisions of the regulations applicable to a detainee, and shall *mutatis mutandis* become subject to all the provisions of the regulations applicable to a protected person, as if he had in the first instance been placed in protective custody.

(b) Any protected person transferred in terms of subregulation (1)(b) to a place of safety where he is detained in protective custody shall be deemed to be discharged from all the provisions of the regulations applicable to a protected person and shall *mutatis mutandis* become subject to all the provisions of the regulations applicable to a detainee, as if he had in the first instance been detained in protective custody.

5. Discharge from protective custody.—Subject to the provisions of section 185A (4) a detainee or protected person shall remain under protective custody until—

- (a) he, or if he is a minor his parent or guardian, has completed and signed a discharge from detention or a waiver of protection in the form of Form D in the Annexure and has submitted it to the person in charge of the place of safety or the commander, as the case may be; or
- (b) the person in charge of the place of safety where a detainee is being detained, or the commander in respect of a protected person discharges him on the grounds of the written advice of the attorney-general referred to in section 185A (3) of the Act.

6. Expenses in connection with protective custody.—(1) The Director-General may authorize that any expenses incurred under these regulations in connection with the protective custody of any person be defrayed from public funds.

(2) The Director-General may, for the purposes of this regulation, enter into an agreement with any person.

CHAPTER II DETENTION IN PROTECTIVE CUSTODY

7. Detention in place of safety.—Any person who has applied in accordance with regulation 2 to be detained in protective custody and has given authorization thereto shall be detained in a prison as defined in section 1 of the Correctional Services Act, 1959 (Act No. 8 of 1959), or a police cell or lock-up.

8. Search.—A detainee may be searched by any member or at the direction of such member, if such member deems it necessary: Provided that the searching of any detainee shall be conducted with strict regard to decency and order and that a man shall be searched by a man only and a woman shall be searched by a woman only.

9. Seizure.—Any object which, in the opinion of any member, is not in the interest of the detainee's safety or the safety of any other person or in the interest of good order in the place of safety may be seized by such member, noted in a register and taken into safe-keeping.

10. Disposal of private property of detainee.—(1) The private property of a detainee which is in the possession of or under the control of the person in charge of the place of safety shall—

- (a) be handed to the detainee on discharge; or
- (b) be handed to the detainee's wife, child or next-of-kin if the detainee has escaped and cannot be traced within 60 days or has died.

(2) If a detainee's wife, child or next-of-kin cannot be traced or is unwilling to take possession of the property referred to in subregulation (1), the property shall, after six months, be sold by auction and the proceeds of the auction shall be paid into the State Revenue Fund.

(3) The Treasury may give permission for the amount which has been deposited in the State Revenue Fund under subregulation (2) or a part thereof to be paid to the detainee or his wife, child or next-of-kin.

11. Orders to detainee.—A member may give such orders to a detainee as he may deem reasonable and necessary in the circumstances in order to maintain discipline and order and to ensure the protection or safety of the detainee or any other person.

12. Duties of person in charge of place of safety.—The person in charge of a place of safety shall see to it that—

- (a) a detainee is exposed to the public as little as possible;
- (b) all necessary measures are taken to ensure a detainee's safety;
- (c) all necessary measures are taken to protect a detainee against the disclosure of his identity, unlawful attacks and intimidation;
- (d) a detainee is visited daily and that his accommodation and any complaint or request of his receive attention;
- (e) the place where the detainee is detained is visited at least twice a week at irregular times during the the night to ensure that everything is in order;
- (f) an ill or injured detainee is visited as often as is necessary by a medical officer and that any detainee who complains that he is ill or injured is examined and treated by a medical officer and that the orders of the medical officer in relation to such detainee are complied with;
- (g) a detainee is examined and treated in accordance with paragraph (f) by a private medical practitioner if so requested by the detainee and if he is able to pay the costs of such examination and treatment and accepts full liability for the payment of such costs;
- (h) a detainee is interviewed as close to his discharge as possible;
- (i) a detainee's physical and mental needs are satisfied as far as possible; and

- (j) any matter which a detainee wishes to bring to the attention of the attorney-general is conveyed to the attorney-general forthwith.

13. Access to detainee.—(1) No person except a sheriff, a judge of the Supreme Court of South Africa, an officer in the service of the State who acts in his official capacity, or a legal practitioner and a private medical practitioner at the request of a detainee shall have access to the detainee.

(2) The person in charge of a place of safety may, if the detainee wishes to receive a visit, unless the attorney-general, having regard to the safety of the detainee or any other person, in general or in a particular case orders otherwise, and subject to the instructions of the attorney-general, give permission to any person to visit the detainee for any special or general purpose.

14. Payment of allowances to detainee.—(1) A detainee shall, for the period during which he is detained in protective custody, be entitled to an allowance of R10 per day minus any amount which he may receive as witness fees, if he does not receive any income as a result of the fact that he is in protective custody.

(2) The Director-General may, on satisfactory proof having been produced that a detainee has forfeited income as a result of the fact that he is or was detained in protective custody, order that an allowance equal to the actual amount of income so forfeited, minus the daily allowance payable to him in terms of subregulation (1) and any witness fees payable to him, up to a maximum amount of R400 per day, be paid to the detainee.

(3) The Director-General may authorize that the tariff prescribed by subregulation (2) may be exceeded if he is satisfied that the application of that subregulation is causing a detainee or his dependants or family financial hardship.

(4) A detainee may be provided with suitable clothing and other necessary requirements to a maximum purchase amount of R400 if he, in the opinion of the person in charge of the place of safety, has unserviceable clothing or no clothing and is not able to purchase suitable clothing or other necessary requirements from his own funds, including the allowances referred to in subregulations (1) to (3) and any witness fees: Provided that if the person in charge of the place of safety is satisfied that the said amount is insufficient, he may obtain authorization from the Director-General to exceed that amount.

(5) Any expenses incurred by the State in terms of subregulation (4) in respect of a specific detainee, or to render medical care to a detainee may be brought into account before an allowance is paid to the detainee in terms of this regulation.

CHAPTER III PLACING UNDER PROTECTIVE CUSTODY

15. Placing under protective custody.—(1) The person in charge of the police station or prison where a witness or prospective witness applies, in accordance with the provisions of regulation 2, to be placed under protective custody shall, after consultation with the witness or prospective witness who desires protection, determine the place where such witness or prospective witness shall be placed and he shall designate one or more persons as security officers to take care of the safety of the witness or prospective witness in accordance with the instructions issued by him.

(2) (a) If the person in charge of the police station or prison referred to in subregulation (1) is not able to determine a place for placing or to designate a security officer for the witness or prospective witness who desires protection, he shall submit the application and authorization for protective custody of the witness or prospective witness concerned to a person designated generally or specifically for that purpose by the Commissioner of the South African Police or the Commissioner of

Correctional Services.

(b) The person designated in terms of paragraph (a) shall determine, after consultation with the witness or prospective witness, the place where such witness or prospective witness shall be placed, and he shall designate one or more persons as security officers to take care of the safety of the witness or prospective witness in accordance with the instructions issued by him.

(3) The commander may according to circumstances designate other security officers in respect of a particular protected person and may amend the instructions referred to in subregulation (1) or (2) (b).

(4) In this regulation “witness” includes any member of his family or household or any dependant of his or of such member.

16. Search.—(1) A protected person may be searched if the security officer deems it necessary: Provided that the searching of any protected person shall be conducted with strict regard to decency and order and that a man shall be searched by a man only and a woman shall be searched by a woman only.

17. Seizure.—Any object which, in the opinion of the security officer, is not in the interest of the protected person’s safety or the safety of any other person or in the interest of good order in the place where the protected person is being protected, may be seized by such officer, noted in a register and taken into safe-keeping.

18. Orders to protected person.—A security officer may give such orders to a protected person as he may deem reasonable and necessary in the circumstances in order to achieve efficient security or such orders as may contribute to the safety of the security officer, the protected person or any other person.

19. Duties of commander.—The commander shall see to it that—

- (a) all necessary measures are taken for the continuous safety of a protected person and give or cause to be given further orders in this regard to the relevant security officer;
- (b) measures are taken for the safe-keeping of all moneys or valuables or any other article in the possession of a protected person, if the latter so requests and it is deemed necessary or desirable;
- (c) an ill or injured protected person is visited as often as is necessary by a medical officer and that any protected person who complains that he is ill or injured is examined and treated by a medical officer and that the orders of the medical officer in relation to such person are complied with;
- (d) a protected person is examined and treated in accordance with paragraph (c) by a private medical practitioner if so requested by the protected person and if he is able to pay the costs of such examination and treatment and accepts full liability for the payment of such costs;
- (e) a protected person’s physical and mental needs are satisfied as far as possible; and
- (f) any matter which a protected person wishes to bring to the attention of the attorney-general is conveyed to the attorney-general forthwith.

20. Complaints or requests by protected person.—A security officer shall give attention to each complaint or request of a protected person and bring it forthwith to the attention of the commander or any person designated by him.

21. Access to protected person.—(1) No person except a sheriff, a judge of the Supreme Court of South Africa, an officer in the service of the State who acts in his official capacity, or a legal practitioner and a private medical practitioner at the request of a protected person shall have access to the protected person.

(2) The security officer may, if the protected person wishes to receive a visit, unless the attorney-general, having regard to the safety of the protected person or any other person, in general or in a particular case orders otherwise, and subject to the instructions of the attorney-general, give permission to any person to visit the protected person for any special or general purpose.

22. Payment of allowances to protected person.—(1) A protected person shall, for the period during which he is placed under protective custody, be entitled to an allowance of R10 per day minus any amount which he may receive as witness fees, if he does not receive any income as a result of the fact that he is in protective custody.

(2) The Director-General may, on satisfactory proof having been produced that a protected person has forfeited income as a result of the fact that he is or was placed under protective custody, order that an allowance equal to the actual amount of income so forfeited, minus the daily allowance payable to him in terms of subregulation (1) and any witness fees payable to him, up to a maximum amount of R400 per day, be paid to the protected person.

(3) The Director-General may authorize that the tariff prescribed by subregulation (2) may be exceeded if he is satisfied that the application of that subregulation is causing a protected person or his dependants or family financial hardship.

(4) A protected person may be provided with suitable clothing and other necessary requirements to a maximum purchase amount of R400 if he, in the opinion of the commander, has unserviceable clothing or no clothing and is not able to purchase suitable clothing or other necessary requirements from his own funds, including the allowances referred to in subregulations (1) to (3) and any witness fees: Provided that if the commander is satisfied that the said amount is insufficient, he may obtain authorization from the Director-General to exceed that amount.

(5) Any expenses incurred by the State in terms of subregulation (4) in respect of a specific protected person or to render medical care to a protected person may be brought into account before an allowance is paid to the protected person in terms of this regulation.

CHAPTER IV OFFENCES AND PENALTIES

23. Offences and penalties.—(1) Any person in protective custody who refuses or fails to comply with an order under regulations 11 or 18 shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months.

(2) Any person who contravenes any provision of regulation 3 shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months.

(3) Any person who gains or causes access or attempts to gain or to cause access to a person in protective custody contrary to the provisions of regulations 13 or 21 shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months.

ANNEXURE

Form A

APPLICATION BY WITNESS OR PROSPECTIVE WITNESS TO BE DETAINED IN OR
PLACED UNDER PROTECTIVE CUSTODY

[Section 185A (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)]

University of Cape Town

1. I,....., a)
hereby make an application that—

* (i) I

* and

* (ii) b)

my..... c)

be detained in or placed under protective custody seeing that I have reason to believe
that *my safety/*and *the safety of the above-mentioned *person/persons is being
threatened by.....

..... d)

in that..... e)

2. I—

* (i) gave or shall give evidence on..... f)
at..... g),
or

* (ii) shall possibly give evidence on..... f)
at..... g),
or

* (iii) have material information at my disposal and am willing to testify in a criminal court,
in the case against..... h)
with regard to the offence of.....
..... i)

3. I,.....
.....
hereby declare that the above-mentioned information is, to the best of my knowledge, true,
complete and correct and that I am aware of the fact that it is an offence if I wilfully furnish
information or make a statement which is false or misleading.

.....
(Signature/mark/thumbprint of deponent)

4. I,.....
hereby certify that I have interpreted truly and to the best of my abilities correctly in
relation to the contents of this statement and any question put to the deponent by the
member.

.....

Form B

AUTHORIZATION BY WITNESS OR PROSPECTIVE WITNESS TO BE DETAINED IN OR
PLACED UNDER PROTECTIVE CUSTODY

University of Cape Town

1. I.....,
*witness/prospective witness, hereby give authorization that I—
*(i) be detained in protective custody;
or
*(ii) be placed under protective custody.
2. I have the following physical injuries:
.....
.....
.....
..... a)
3. I.....
hereby declare that the above-mentioned information is, to the best of my knowledge, true,
complete and correct and that I am aware of the fact that it is an offence if I wilfully furnish
information or make a statement which is false or misleading.
.....
(Signature/mark/thumbprint of deponent)
4. I.....,
*parent/guardian of the above-mentioned witness, hereby give authorization for the
above-mentioned person to be so protected.
.....
(Signature/mark/thumbprint of parent/guardian)
5. I.....
hereby certify that I have interpreted truly and to the best of my abilities correctly in
relation to the contents of this statement and any question put to the deponent by the
member.
.....
(Signature of interpreter)
.....
(Full name)
.....
[Designation (Rank)]
.....
.....
.....
.....
(Address of employment)
6. I.....
hereby certify that before the deponent affixed *his/her mark, thumbprint or signature to
this form, I read the statement to *him/her and informed *him/her that it is an offence
wilfully to furnish information or make a statement which is false or misleading.
.....
(Signature of official)
.....
(Full name)

Form C

AUTHORIZATION BY A MEMBER OF THE FAMILY OR HOUSEHOLD OR A DEFENDANT
OF A WITNESS OR PROSPECTIVE WITNESS OR OF SUCH A MEMBER TO BE DETAINED
IN OR PLACED UNDER PROTECTIVE CUSTODY

University of Cape Town

1. I,..... a)
a..... b)
of..... c),
hereby give authorization that I—

*(i) be detained in protective custody;

or

*(ii) be placed under protective custody.

2. I have the following physical injuries:

.....
.....
..... a)

3. I,.....
hereby declare that the above-mentioned information is, to the best of my knowledge, true,
complete and correct and that I am aware that it is an offence wilfully to furnish
information or make a statement which is false or misleading.

.....
(Signature/mark/thumbprint of deponent)

4. I,..... a)
.....

*parent/guardian of the above-mentioned person hereby give authorization for the
above-mentioned person to be so protected.

.....
(Signature/mark/thumbprint of parent/guardian)

5. I,.....
hereby certify that I have interpreted truly and to the best of my abilities correctly in
relation to the contents of this statement and any question put to the deponent by the
member.

.....
(Signature of interpreter)

.....
(Full name)

.....
[Designation (Rank)]

.....
(Address of employment)

6. I,.....
hereby certify that before the deponent affixed *his/her mark, thumbprint or signature to
this form, I read the statement to *him/her and informed *him/her that it is an offence
wilfully to furnish information or make a statement which is false or misleading.

.....

Form D
APPLICATION FOR DISCHARGE FROM DETENTION/WAIVER FROM
DETENTION/WAIVER OF PROTECTION

Whereas I.....^{a)}
gave authorization on.....19.....^{b)} at.....^{c)}
that I be *detained in/*place under protective custody, I now make application to be
*discharged from detention/*released from protective custody.

.....
(Signature/mark/thumbprint)

.....
(Signature/mark/thumbprint of parent/guardian
of above-mentioned person)

Remarks:

- a) State name and surname of detainee/protected person.
- b) State date of authorization for protective custody.
- c) State place where the authorization was given.
- * Delete whichever is not applicable.

GNR.1374 of 30 July 1993: Regulations under section 170A (4) (a)

**DETERMINATION OF THE PERSONS OR THE CATEGORIES OR CLASSES OF PERSONS
WHO ARE COMPETENT TO BE APPOINTED AS INTERMEDIARIES**

NOTE:—These regulations were published in Government Notice R1374 in *Government Gazette* 15024 of 30 July, 1993 and amended by:

Notice	Government Gazette	Date
R.360		28 February 2001
R.597	22435	2 July 2001

Under section 170A (4) (a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), I, Hendrik Jacobus Coetsee, Minister of Justice, hereby determine the following categories or classes of persons to be competent to be appointed as intermediaries:

- (a) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974), and against whose names the speciality paediatrics is also registered.
- (b) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974, and against whose names the speciality psychiatry is also registered.
- (c) Family counsellors who are appointed as such under section 3 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and who are or were registered as social workers under section 17 of the Social Service Professions Act, 1978 (Act No. 110 of 1978), or who are or were educators as contemplated in paragraph (f) hereunder, or who are or were registered as clinical, educational or

counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.

[Para. (c) substituted by GN R597 of 2001.]

- (d) Child care workers who have successfully completed a two-year course in child and youth care approved by the National Association of Child Care Workers and who have two years' experience in child care.

[Para. (d) substituted by GN R597 of 2001.]

- (e) (i) Social workers who are registered as such under section 17 of the Social Service Professions Act, 1978, and who have two years' experience in social work; and
(ii) persons who obtained a master's degree in social work and who have two years' experience in social work.

[Para. (e) substituted by GN R597 of 2001.]

- (f) (i) Persons who have four years' experience as educators and who have not at any stage, as a result of misconduct, been dismissed from service as educators.
(ii) For the purposes of subparagraph (i) "educators" means persons who teach, educate or train other persons, or who provide professional educational services, including professional therapy and educational psychological services at a public, independent or private school as contemplated in the South African Schools Act, 1996 (Act No. 84 of 1996), including former and retired educators.

[Para. (f) substituted by GN R597 of 2001.]

- (g) Psychologists who are registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.

GNR.210 of 19 February 2002: Requirements and certificate for peace officers in terms of section 334 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)

Note:—These regulations were published in Government Notice R210 in Regulation Gazette 23144 of 19 February 2002:

I, PENUELL MPAPA MADUNA, Minister for Justice and Constitutional Development acting under and by virtue of the powers vested in me—

(1) by section 334 (3) (b) of the Criminal Procedure Act, 1977, hereby prescribe that the following shall appear in or on the certificate of appointment referred to in section 334 (2) (a) of the Criminal Procedure Act, 1977 issued to any person falling within a category declared under section 334 of the Criminal Procedure Act, 1977 to be peace officers:

- (i) The full name of the person appointed;
- (ii) his/her identity number;
- (iii) his/her signature;
- (v) a description of the capacity in which he/she was appointed;
- (vi) the name of the employer who made the appointment; and
- (vii) the signature and official stamp of the employer or responsible person; and

(Numbering as per original *Gazette*.)

(2) by section 334 (3) (a) of the Criminal Procedure Act, 1977, hereby prescribe that no

certificate of appointment referred to in section 334 (2) (a) of the Criminal Procedure Act, 1977, shall be issued to any person, unless the employer has been furnished with a certificate issued by an officer of the South African Police Service wherein it is stated that in the opinion of the said officer such person is competent to exercise the powers entrusted to peace officers of that category under section 334 of the Criminal Procedure Act, 1977: Provided that, for the purpose of the issuing of a certificate by a commissioned officer of the South African Police Service, the following criteria shall be considered:

- (i) previous criminal convictions;
- (ii) declaration of unfitness to possess an arm or ammunition as defined in the Arms and Ammunition Act, 1969 (Act No. 75 of 1969); and
- (iii) training with regard to the powers to be exercised.

DR P M MADUNA, MP
Minister of Justice and Constitutional Development

GNR.214 of 28 February 2002: Regulations prescribing the tariff of allowances payable to psychiatrists and clinical psychologists who appear as witnesses in court

These regulations were published in Government Notice R214 contained in *Government Gazette* 23149 on 28 February 2002.

The Minister of Justice and Constitutional Development has, in consultation with the Minister of Finance, under section 191 (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), made the regulations in the Schedule.

SCHEDULE

ARRANGEMENT OF REGULATIONS

- 1–2. Subsistence Allowance
- 3. Travelling Expenses and Transport
- 4–6. Supplementary Provisions

1. Subsistence allowance.—If a psychiatrist who is designated or appointed by or at the request of the court or a clinical psychologist who is directed by the court in terms of section 79 (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), to enquire into the mental condition of an accused and who is not in the full-time service of the State must attend court in connection with an accused whom he or she has examined, he or she shall be compensated for his or her attendance from public funds at the rate of R55 per hour or part of an hour, subject to a maximum of R550 per day.

2. Whenever a psychiatrist or clinical psychologist referred to in regulation 1 is absent from his or her permanent place of residence for the purpose of attending court, he or she shall, in addition to the allowance to which he or she is entitled to in terms of regulation 1, be paid an amount equal to his or her reasonable actual expenses.

3. Travelling expenses and transport.—A psychiatrist or clinical psychologist referred to in regulation 1 may at State expense and in such manner as he or she may deem fit travel to and from the place where the court is in session: Provided that whenever such psychiatrist or clinical psychologist uses private transport, he or she shall be entitled to compensation at the rate of—

- (a) R1,10 per kilometre in the case of a vehicle with an engine swept volume of 2 150 cm³ or less;
- (b) R1,14 per kilometre in the case of a vehicle with an engine swept volume of 2 151 cm³ to 2 500 cm³, inclusive;
- (c) R1,27 per kilometre in the case of a vehicle with an engine swept volume of 2 501 cm³ to 3 500 cm³, inclusive; or
- (d) R1,42 per kilometre in the case of a vehicle with an engine swept volume of over 3 500 cm³.

4. Supplementary Provisions.—The decision of a judicial officer or a registrar or assistant registrar of the High Court of South Africa in respect of the amounts payable in terms of regulations 1, 2 and 3 shall be final.

5. Government Notice R2598 of 1 November 1991, as amended by Government Notice R1343 of 12 August 1996, is repealed as from 28 February 2002.

6. These regulations shall come into operation on 28 February 2002.

GNR.215 of 28 February 2002: Tariff payable to psychiatrists or clinical psychologists for an enquiry into the mental condition of an accused

NOTE—This tariff was published in Government Notice R215 contained in *Government Gazette* 23149 of 28 February 2002.

The Minister of Justice and Constitutional Development has, in consultation with the Minister of Finance, under section 79 (11) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), determined the tariff in the Schedule.

SCHEDULE

1. A psychiatrist who is designated or appointed by or at the request of the court or a clinical psychologist who is directed by the court in terms of section 79 (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), to enquire into the mental condition of an accused and who is not in the full-time service of the State, shall be compensated for his or her services in connection with such enquiry from public funds at the rate of R150 per hour or part of an hour.

2. The decision of a judicial officer or a registrar or assistant registrar of the High Court of South Africa in respect of the amount payable in terms of this tariff shall be final.

3. Government Notice R2599 of 1 November 1991 is repealed from 28 February 2002.

4. This tariff shall come into operation on the 28 February 2002.

GNR.239 of 14 February 2003: Determination of amounts for the purposes of certain provisions of the Criminal Procedure Act, 1977

I, Penuell Mpapa Maduna, Minister for Justice and Constitutional Development, acting under sections 9 (1) (a), 56 (1), 57 (1) (a) and (5) (b), 57A (1), 112 (1) (a) and (b), 300 (1) (a) and 302 (1) (a) (ii) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)—

- (a) hereby determine, for the purposes of the section of the said Act mentioned in Column 1 of the Schedule, the amount mentioned opposite thereto in Column 2 of the Schedule; and
- (b) hereby repeal Government Notice No. R.1410 of 30 October 1998.

P M. MADUNA
Minister for Justice and Constitutional Development

SCHEDULE

Column 1 RELEVANT SECTION OF THE SAID ACT	Column 2 AMOUNT DETERMINED
Section 9 (1) (a).....	R1 500
Section 56 (1).....	R2 500
Section 57 (1) (a) and (5) (b).....	R5 000
Section 57A (1).....	R5 000
Section 112 (1) (a) and (b).....	R1 500
Section 300 (1) (a).....	R500 000 in respect of a regional court, and R100 000 in respect of a magistrate's court
Section 302 (1) (a) (ii).....	R3 000 in the case of a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, and R6 000 in the case of a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer.

NOTICES

GNR.1507 of 6 October 1995: Notices under section 212 (4) (a)

DESIGNATION OF A BODY FOR THE PURPOSES OF SECTION 212 (4) (a) OF THE
CRIMINAL PROCEDURE ACT, 1977

NOTE:—This notice was published in Government Notice R1507 in *Government Gazette* 16707 of 6 October, 1995.

Under section 212 (4) (a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), I, Abdullah Mohamed Omar, Minister of Justice, hereby designate the Board of Umgeni Water, a water board established in terms of section 108 of the Water Act, 1956 (Act No. 54 of 1956), as a body for the purposes of the said section 214 (4) (a).

AM OMAR,
Minister of Justice

GNR.889 of 30 July 2004: Designation of a body for the purposes of section 212 (4) (a) and (8) (a) of the Criminal Procedure Act, 1977

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Under section 212 (4) (a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), I, Brigitte Sylvia Mabandla, Minister for Justice and Constitutional Development, hereby designate the Agricultural Research Council, a council established in terms of section 2 of the Agricultural Research Act, 1990 (Act No. 86 of 1990), as a body for the purposes of the said section 212 (4) (a) and (8) (a).

B S MABANDLA

Minister for Justice and Constitutional Development

DIRECTIVES

GNR.898 of 20 April 2001: Directives under section 4 of the Criminal Matters Amendment Act No. 76 of 1997

DIRECTIVES IN TERMS OF SECTION 4 OF THE CRIMINAL PROCEDURE AMENDMENT ACT, 1997 (ACT NO. 76 OF 1997)

NOTE:—This directive was published in Government Notice R898 in *Government Gazette* 22250 of 20 April, 2001.

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

The Legal Aid Board has under section 4 of the Criminal Procedure Amendment Act 1997 (Act No. 76 of 1997) and in consultation with the Minister for Justice and Constitutional Development, drafted the directives in the Annexure, which directives were submitted to Parliament.

In view of the judgement of the Constitutional Court in *S v STEYN* 2001 (1) BCLR 52 (CC) the directives will be reconsidered after amendments to sections 309B and 309C of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) have been effected.

ANNEXURE

ARRANGEMENT OF REGULATIONS

1. Definitions
 2. Substantial Injustice
 3. Applications for leave to appeal
 4. Petitions, applications to lead further evidence and applications for bail pending appeal
 5. Reports to the Director
 6. Fees and disbursements payable to legal practitioners in respect of criminal appeals
 7. General
- Annexure E.3 Legal aid board

1. Definitions

“Act” means the Legal Aid Act, 1969 (Act No. 22 of 1969) as amended.

“Board” means the Legal Aid Board established in terms of the Act.

“Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

“Director” means the Chief Executive Officer of the Board or any person delegated by him, in writing.

“Guide” means the 1996 Legal Aid Guide, issued by the Board pursuant to its powers in terms of section 3 (d) of the Act, as amended by Circulars issued by the Director from time to time.

“Legal Aid Officer” means a legal aid officer or assistant legal aid officer in the employ of the Board or any person in the employ of the Department of Justice delegated to carry out the functions of a legal aid officer on an agency basis.

“Rotation List” means the rotation list compiled from time to time by a legal aid officer acting in terms of the Guide.

2. Substantial Injustice

2.1 The right to an appeal is an integral part of the right to a fair trial and, where substantial injustice would otherwise result, the accused is entitled to legal representation at State expense for the purposes of an appeal. This does not however mean that every accused who is convicted is forthwith entitled to legal aid for purposes of an appeal.

2.2 Substantial injustice will, for present purposes, be assumed to arise in respect of a contemplated appeal in a criminal matter if legal representation is not made available to the accused at State expense in circumstances where—

- 2.2.1 the accused is unable to afford the cost of his/her own legal representation in respect of the contemplated appeal; and
- 2.2.2 the accused has been sentenced to direct imprisonment without the option of a fine; and
- 2.2.3 there is a reasonable prospect of success in relation to the contemplated appeal.

2.3 An accused must comply with all three of the criteria set out in paragraph 2.2 above.

2.4 Whether or not the accused is unable to afford the cost of his/her own legal representation in respect of the contemplated appeal is a matter to be determined by legal aid officers as follows:

- 2.4.1 The legal aid applicant completes the means test as provided in Chapter 2 of the Guide (see Annexure LA. 13B hereto). If the legal aid applicant qualifies for legal aid in terms of the means test the legal aid applicant is indigent and is obviously unable to afford the cost of his/her own legal representation. Consequently, if the legal aid applicant qualifies in terms of the means test, the enquiry in respect of the legal aid applicant's ability to pay for the cost of his/her own legal representation need proceed no further.
- 2.4.2 If the legal aid applicant does not qualify for legal aid, then Annexure LA. 13C hereto is to be completed and forwarded to the Director who will consider whether or not the legal aid applicant qualifies for the assignment of legal representation at State expense, taking into account the income, expenditure, assets and liabilities of the legal aid

applicant, the nature and number of the charges involved, the number of co-accused involved, the forum in which the proceedings are to take place, the anticipated duration of such proceedings and any factors relating to the complexity of the matter which may be drawn to the attention of the Director.

2.5 In relation to criminal appeals, the legal aid officer should ascertain from the accused whether he/she has been sentenced to direct imprisonment without the option of a fine. If in any doubt the legal aid officer may peruse the relevant charge sheet.

2.6 Sections 309B and 309C of the Criminal Procedure Act, 1977, as amended, for the most part relieves the Board of the responsibility of determining whether or not a legal aid applicant in respect of a criminal appeal has a reasonable prospect of success.

2.6.1 A legal aid applicant who has been granted leave to appeal by the court *a quo* will be deemed to have a reasonable prospect of success in the immediately superior tribunal.

2.6.2 A legal aid applicant who has been granted leave to appeal by the petition process will be deemed to have a reasonable prospect of success before the court which granted the petition.

2.6.3 Any legal aid applicant who has neither obtained leave to appeal nor been granted leave to appeal by the petition process will be deemed not to have a reasonable prospect of success and not to be entitled to legal representation on State expense in terms of section 35 (3) (g) of the Constitution. The Director will however have a discretion to authorise legal aid for a further petition to the Supreme Court of Appeal.

3. Applications for leave to appeal

3.1 The mandate of a legal practitioner instructed on a legal aid basis in respect of the defence of the accused in the court *a quo* will extend to include the bringing of an application for leave to appeal on a legal aid basis provided such application for leave to appeal is brought within the time periods prescribed by section 309B or section 316 of the Criminal Procedure Act, 1997, as the case may be.

3.2 Where any application for leave to appeal needs to be accompanied by an application for condonation, the legal aid applicant will have to apply for legal aid anew and the Director will have to be satisfied by the legal aid applicant or his legal representative that the contemplated application for condonation has a reasonable prospect of success.

3.3 Legal practitioners have a continuing obligation, in terms of paragraph 5.11 of the Guide to ensure that their legal aid clients continue to qualify for legal aid and to draw any change in the circumstances of the legal aid applicant to the attention of the Director.

3.4 Whenever possible an application for leave to appeal must be brought on the same day sentence is handed down. Where this is not possible, for whatever reasons, a detailed written explanation as to why it was not possible to bring the application for leave to appeal on the same day on which sentence was handed down must accompany the account of the legal practitioner.

4. Petitions, applications to lead further evidence and applications for bail pending appeal

4.1 The legal aid mandate of a legal practitioner who was instructed in respect of the trial in the court *a quo* will in future extend to the launching of a petition on a legal aid basis provided such petition is delivered within the time periods specified in Sections 309C or 316 of the Criminal Procedure Act, 1977, as the case may be and further provided that no legal practitioner shall launch any petition on behalf of any legal aid applicant unless such petition has a reasonable prospect of success. Any judge who refuses a petition and who is of the view that such petition never had a reasonable prospect of success and ought not to have been launched may bring such view to the attention of the Director in writing within 14 days of the refusal of the said petition. In the event of a

judge communicating to the Director that a petition launched on a legal aid basis never had a reasonable prospect of success the Board shall be entitled to and will refuse payment to the legal practitioner concerned of any fees or disbursements relating to the petition in question or reasonably incidental thereto.

4.2 Where no petition is brought timeously and where an application for condonation becomes necessary, a fresh application for legal aid by the legal aid applicant will be necessary and it will be necessary for the Director to be satisfied that the contemplated application for condonation has a reasonable prospect of success.

4.3 Where leave to appeal against a judgement or order of the lower court has been refused by the rejection of a petition by the High Court no further petition to the Supreme Court of Appeal may be launched on a legal aid basis without the Director first having been satisfied that the contemplated petition to the Supreme Court of Appeal has a reasonable prospect of success. In such an instance it will be necessary for the legal aid applicant to make a fresh application for legal aid.

4.4 An application for the adducement of further evidence is not to be brought on a legal aid basis unless the Director has first been satisfied that the application to lead further evidence has a reasonable prospect of success save in those instances where such application to adduce further evidence is brought simultaneously with the petition at no additional cost to the Board.

4.5 A legal practitioner who is entitled to bring an application for leave to appeal or to launch a petition shall be entitled to apply on behalf of the accused for bail pending the determination of the contemplated appeal provided the accused was not *de facto* in detention prior to his/her conviction and further provided that no appeal against any refusal of bail pending an appeal may be conducted on a legal aid basis without the Director's consent.

5. Reports to the Director

5.1 Where any application for condonation is necessary, or when an application to lead further evidence is contemplated, or where the court *a quo* was a Magistrate's Court and a petition to the Chief Justice is contemplated, or where an appeal against the refusal of bail pending an appeal is contemplated, it will be necessary for the Director to be satisfied in advance that the contemplated step has a reasonable prospect of success.

5.2 Where it is necessary in respect of a criminal appeal or any ancillary step to satisfy the Director that any such step has a reasonable prospect of success, a written report must be submitted to the Director by the legal practitioner instructed by the Board setting out—

- 5.2.1 the full names of all the contemplated appellants;
- 5.2.2 a proper description of the court *a quo*, the case number and the date or dates of conviction and sentence;
- 5.2.3 the charge or charges in respect of which the legal aid applicant contemplates an appeal and the sentence imposed in respect of each such charge;
- 5.2.4 the nature of any evidence wrongly admitted at the trial and the reasons, with authority, for submitting that such evidence was wrongly admitted;
- 5.2.5 the nature of any misdirection on any point of law by the presiding judicial officer and the reasons, with authority, for submitting that such misdirection took place;
- 5.2.6 the nature of any erroneous deductions and/or conclusions reached by the judicial officer and the reasons, where appropriate with authority, for believing that such deductions/conclusions are erroneous;
- 5.2.7 any appropriate submission, with authority, as to why the sentence or any portion thereof was strikingly inappropriate;

- 5.2.8 whether it will be necessary for the accused to launch an application for condonation and, if so, the precise nature of the condonation required, including the extent of the delay to be condoned and the reasons, supported by authority, for believing that such condonation will be granted;
- 5.2.9 if any petition to the Chief Justice is contemplated against a conviction and/or sentence of a Magistrate's Court, detailed submissions will be required, with authority, as to why the Judge President or the judges delegated thereto by him/her erred in refusing leave to appeal;
- 5.2.10 if any application to lead further evidence is contemplated, the precise nature of such evidence must be set out together with a detailed explanation as to why such evidence was not available and was not placed before the court at the time of the trial together with any submissions, with authority, as to why such application is likely to be granted;
- 5.2.11 the prospects of success with reasons for such submissions in respect of a contemplated appeal against a refusal of bail pending an appeal;
- 5.2.12 the costs of the contemplated proceedings in terms of the tariff herein set out and how such costs are computed;

5.3 When an accused, who was not legally represented in the court *a quo*, applies for legal aid in respect of a contemplated appeal but requires condonation because no application for leave to appeal has been brought timeously or no petition has been brought timeously, the legal aid officer shall determine whether the accused qualifies for legal aid in terms of the directives set out in paragraphs 2.2 to 2.5 above and the legal aid officer shall thereafter issue an instruction to a legal practitioner to read as follows:

- “1. To consult with the accused in terms of section 35 (2) (c) of the Constitution.
2. To obtain a copy of the record in terms of rule 66 (9) of the Magistrates' Courts Rules
3. To report to the Director of the Board on the merits of the contemplated appeal and application for condonation and to obtain his response before proceeding therewith.”

5.4 Where an accused who qualifies for legal aid in terms of paragraphs 2.2 to 2.5 above was not represented before the court *a quo* but applies for legal aid in respect of an appeal within the time limits prescribed for the bringing of an application for leave to appeal, or if leave to appeal has already been refused, within the time limits prescribed for the bringing of a petition, the legal aid officer shall issue a legal aid instruction to a legal practitioner which should read as follows:

- “1. To assist the legal aid applicant with an application for leave to appeal and/or a petition against conviction and/or sentence under case number handed down by the Court at on
2. To obtain a copy of the record in terms of rule 66 (9) of the Magistrates' Courts Rules.
3. To report in due course to the Director of the Board on the outcome of the application for leave to appeal and/or petition.”

5.5 In other instances where an application for legal aid/a new application for legal aid needs to be made prior to the finalisation of the application for leave to appeal/petition procedure, the legal aid officer should ascertain whether the legal aid applicant qualifies for legal aid as set out in paragraphs 2.2 to 2.5 above and if so satisfied, the legal aid officer shall issue a legal aid instruction in favour of a legal practitioner to read as follows:

- “1. To consult with the accused in terms of section 35 (2) (c) of the Constitution.
2. To obtain a copy of the record in terms of rule 66 (9) of the Magistrates' Courts Rules.

3. *To report to the Director of the Board on the merits of the contemplated application for condonation/application to lead further evidence/petition to the Chief Justice (in respect of an accused convicted and sentenced in a Magistrate's Court), appeal against the refusal of bail pending appeal, on the merits of the contemplated appeal/petition/application and to obtain his response before proceeding therewith."*

5.6 Where in any instance a legal practitioner is required to submit a report to the Director of the Board on the merits of the matter, the legal practitioner may, pending the reply by the Director, take all such steps on a legal aid basis as are necessary to prevent—

- 5.6.1 the accused having to apply for condonation provided no application for condonation was already necessary at the stage where the merit report was submitted to the Director;
- 5.6.2 the appeal being struck off the roll provided the report was submitted to the Director at least twelve weeks prior to the date appointed for the hearing of the appeal.

5.7 After any application for leave to appeal and petition is disposed of either favourably or otherwise, the mandate of the legal practitioner instructed on a legal aid basis in respect thereof will *ipso facto* terminate. The legal aid applicant/accused may thereafter reapply for legal aid in respect of the proceedings before the court which is to hear the appeal. The basis on which the legal aid officer will decide whether or not the legal aid applicant is to receive legal aid in respect of the actual appeal is the same as that set out above but the legal practitioner instructed in respect of such appeal will be a legal practitioner practising within the Magisterial District where the seat of the court which is to hear the appeal is situate and whose name appears on the Rotation List in respect of criminal matters in the High Court. If the legal practitioner who represented the legal aid applicant in the court *a quo* appears on the relevant Rotation List in respect of criminal matters in the High Court and if such information is drawn to the attention of the legal aid officer, the legal aid officer shall instruct such legal practitioner in respect of the appeal, unless the Director directs otherwise. Save with the leave of the Director, only one legal practitioner shall be instructed on a legal aid basis in respect of a criminal appeal.

6. Fees and disbursements payable to legal practitioners in respect of criminal appeals.

6.1 The fees and disbursements payable to legal practitioners who undertake criminal appeals and/or related matters incidental thereto shall be in accordance with Annexure E.3 hereto.

7. General

7.1 In the event of the Director exercising the discretion vested in him/her in terms of these directives in favour of any legal aid applicant and/or in favour of any legal practitioner details of the matter in respect of which such discretion was exercised, the extent to which any legal aid recipient exceeded the means test, details of any increased or additional fees and/or disbursements authorised and the reasons for the exercise of such discretion shall be recorded in a report submitted by the Director to the Minister of Justice.

7.2 The reports envisaged in paragraph 7.1 above shall be submitted to the Minister of Justice quarterly with the first report to be submitted on or before 30 September 1999.

7.3 The Minister of Justice shall table the reports received by him in terms of paragraph 7.2 above before Parliament.

Annexure E.3 LEGAL AID BOARD

1. Fees and Disbursements payable to Legal Practitioners in respect of Criminal Appeals.

	<i>Appeals to the High Court</i>	<i>Appeals to the Supreme Court of Appeal</i>
1. Report to the Director of the Legal Aid Board on the merits of a matter.	R112,50	R150,00
2. Application for leave to appeal brought on the same day judgement was handed down.	R75,00	R112,50
3. Application for leave to appeal brought on a date other than the date on which judgement is handed down and provided the Director is satisfied that there was good reason for the legal practitioner concerned not bringing such on the date on which judgement was handed down.	R112,50	R150,00
4. Application for leave to appeal on a date other than the date on which judgement is handed down but where the legal practitioner has failed to satisfy the Director that there was good reason for such application for leave to appeal being brought on another day.	Nil to R60,00	Nil to R90,00
5. Petition including all typing, copies and attendances relevant thereto.	R225,00	R300,00
6. Application for condonation including all typing, copies and attendances relevant thereto.	R75,00	R112,50
7. Application to lead further evidence including all typing, copies and attendances thereto.	R75,00	R112,50
8. Application for a copy of a record in terms of Rule 66 (9) of the Magistrates' Courts Rules/49A of the Uniform Rules/52 of the Uniform Rules including all typing, copies and attendances relevant thereto.	R37,50	R37,50
9. Necessary perusal of any record after the granting of leave to appeal and pursuant to the issue of a fresh legal aid instruction or where otherwise permitted by the Director.	75c per page	75c per page

10.	Heads of argument including all typing, copies and attendances relevant thereto.	R300,00	R300,00
11.	On appearing before court to argue appeal and including the noting of judgement, the final report to the Director and the report back to the legal aid applicant.	R750,00 This fee includes any consultations or perusal on that day and any application made on that day.	R1050,00 This fee includes any consultations or perusal on that day and any application on that day.
12.	The fees in the preceding paragraphs shall be increased by 25% for each additional accused being represented to a maximum of an additional 150% for all co-accused.	25% extra on 1.11 above for each additional accused up to 7 represented by the practitioner on a legal aid basis.	25% extra on 1.11 above for each additional accused up to 7 represented by the practitioner on a legal aid basis.
13.	Any necessary consultation with an accused or a witness whose evidence is yet to be led. Not more than one consultation per accused or per witness.	R112 50	R112,50
14.	Application for bail pending appeal provided the accused was not in custody prior to conviction.	R 37,50	R 37,50
15.	Necessary travelling costs.	R1,00 per kilometre including VAT where applicable for a total distance travelled in excess of 100 kilometres or economy class air fare whichever is the lesser.	R1,00 per kilometre including VAT where applicable for a total distance travelled in excess of 100 kilometres or economy class air fare whichever is the lesser.
16.	Necessary accommodation and subsistence expenses. Such must be supported by relevant vouchers and tax invoices. Accommodation and subsistence are not permitted where the practitioner practises less than 200 km from the court which is to hear the matter.	Not more than R300,00 per night.	Not more than R300,00 per night.
17.	Other disbursements.	As authorised by the Director in writing in advance.	As authorised by the Director in writing in advance.
18.	VAT on fees in respect of those legal practitioners registered for VAT.	14%	15%

2. The Director has a general discretion to agree to special fees in circumstances which justify

deviation from the above tariff.

LEGAL AID BOARD

LA.13B

MEANS TEST IN CONSTITUTIONAL MATTERS

Location:	Applicant:	Ref. No.:
		Applicant
GROSS INCOME: MONTHLY	Salary	R
Plus	Allowances	+ R
Plus	Subsidy	+ R
Plus	Bonuses	+ R
Plus	Interest	+ R
Plus	Rentals	+ R
Plus	Other	+ R
	TOTAL =	R
PLUS: PROPERTY		
IMMOVABLE: Reasonable market value	R	
Less Bonds	- R	
Other Property	= R	
Bank balances and savings	+ R	
Investments and Deposits	+ R	
Monies due to Applicant	+ R	
Nett value	= R	
DIVIDED by 120	R	+ R
	GROSS INCOME	= R
DEDUCTIONS		
Income Tax	R	
Unemployment Insurance	+ R	
Compulsory Group Insurance	+ R	
Medical Fund Contribution	+ R	
Pension	+ R	
Rent or Mortgage Instalment (Max R1 000)	+ R	
Maintenance in terms of court order	+ R	
School fees and contributions*	+ R	
* Not applicable to private schools	TOTAL DEDUCTIONS =	- R
	Calculated Income	= R

	Deduct R600 for Application	– R
	SUB-TOTAL	= R
	Deduct R180 per child (if applicable) . . . × R180 =	– R
		= R
Dependents actually supported by the applicant		
Name	Age	Name
Name	Age	Name
Name	Age	Name

Complete details of my salary, property and all other income and assets are correctly set out above. All details of my expenses are correctly set out. All the deductions listed above are actually and regularly paid by me on a monthly basis. I realise that if any of the informatioun set out above is false or incomplete, legal aid will be suspended immediately, and I will be prosecuted for fraud.

Date:.....

Signature of
Applicant:

.....

Qualify for legal aid: YES / NO

Date:.....

Legal Aid Officer:

.....

LEGAL AID BOARD

LA.13C

APPLICATION FOR THE PROVISION OF LEGAL REPRESENTATION AT
STATE EXPENSE IN TERMS OF SECTION 35 (3) (g) OF THE CONSTITUTION

PARTICULARS OF APPLICANT'S INCOME AND EXPENDITURE

BRANCH OR MAGISTRATE'S OFFICE:
Reference Number:	NAME OF APPLICANT:
CHARGE(S) If more than one, record total:

CASE NUMBER: 	IN WHICH COURT WILL TRIAL TAKE PLACE: High Court/Regional Court/District Court* (*Delete those inapplicable) ANTICIPATED DURATION OF THE TRIAL
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INCOME AND ASSETS		EXPENDITURE AND LIABILITIES	
1. INCOME			
1.1 Salary	R	1.	R
1.2	R	2.	R
1.3	R	3.	R
2. ASSETS		4.	R
2.1 Immovable	Value	5.	R
Residence	R	6.	R
Other	R	7.	R
2.2 Movable	Value	TOTAL	R
Vehicle	R	Liabilities	
Furniture	R	1.	R
Other	R	2.	R
TOTAL	R	TOTAL	R

.....

Signature of applicant

.....

Signature of Legal Aid Officer

DATE:.....

GN 292 of 8 February 2002: Directives under section 7 of the Criminal Matters Amendment Act, 1998

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

The Legal Aid Board has under section 7 of the Criminal Matters Amendment Act, 1998 (Act No. 68 of 1998), and in consultation with the Minister for Justice and Constitutional Development, drafted the directives in the Schedule, which directives were submitted to Parliament.

SCHEDULE

ARRANGEMENT OF REGULATIONS

1. Definitions
2. Substantial injustice

- 3. Assignment of legal representation at State expense
- 4. Tariff
- Form A. Means test in constitutional matters
- Form B. Application for the provision of legal representation at state expense in terms of section 359 (3) (g) of the Constitution

1. Definitions

“Act” means the Legal Aid Act, 1969 (Act No. 22 of 1969) as amended.

“Board” means the Legal Aid Board established in terms of the Act.

“Criminal Procedure Act” means the Criminal Procedure Act, 1997 and specifically Section 77 thereof as amended by Section 10 of Act 33 of 1986, Section 9 of Act 51 of 1991, Section 42 of Act 129 of 1993 and Section 3 (a) of Act 68 of 1998.

“Director” means the Chief Executive Officer of the Board or any person delegated by him/her in writing.

“Guide” means the 1996 Legal Aid Guide, issued by the Board pursuant to its powers in terms of Section 3 (d) of the Act, as amended by Circulars issued by the Director from time to time.

“Legal aid officer” means a legal aid officer or assistant legal aid officer in the employ of the Board or any person in the employ of the Department of Justice delegated to carry out the functions of a legal aid officer on a agency basis.

“Rotation List” means the rotation list compiled from time to time by a legal aid officer acting in terms of the Guide.

2. Substantial injustice

- 2.1 Substantial injustice will arise in respect of a person who is the accused at proceedings in terms of Section 77 (1) and/or 78 (2) of the Criminal Procedure Act if legal representation is not made available to the accused at state expense in circumstances where the accused is unable to afford the cost of his/her own legal representation in respect of the contemplated proceedings.
- 2.2 Whether or not the accused is unable to afford the cost of his/her own legal representation in respect of the contemplated proceedings is a matter to be determined by legal aid officers as follows:
 - 2.2.1 The legal aid applicant completes the means test as provided in chapter 2 of the Guide (see Form A (LA13B) in the Annexure hereto). If the legal aid applicant qualifies for legal aid in terms of the means test the legal aid applicant is indigent and is obviously unable to afford the cost of his/her own legal representation. Consequently, if the legal aid applicant qualifies in terms of the means test, the enquiry in respect of the legal aid applicant’s ability to pay for the cost of his/her own legal representation need to proceed no further.
 - 2.2.2 If the legal aid applicant does not qualify for legal aid on the basis of the means test, then Form B (LA13C) in the Annexure hereto, is to be completed and forwarded to the Director who will consider whether or not the legal aid applicant qualifies for the assignment of legal representation at state expense, taking into account the income, expenditure, assets and liabilities of the legal aid applicant, the nature and number of the charges involved, the number of co-accused involved, the forum in which the

proceedings are to take place, the anticipated duration of such proceedings and any other factors relating to the complexity and anticipated costs of the conduct of the matter which may be drawn to the attention of the Director.

3. Assignment of legal representation at State expense

- 3.1 If the legal aid applicant qualifies for legal aid in terms of the means test or in terms of the decision of the Director the legal aid officer receiving the application for legal aid shall instruct a legal practitioner to represent the legal aid applicant, selecting such legal practitioner from the Rotation List in accordance with the Guide.
- 3.2 In the event of a prisoner declining and/or failing to apply for legal representation at state expense the presiding judicial officer concerned shall nevertheless be entitled to advise the legal aid officer of the magisterial district in which the proceedings are scheduled to take place and/or are taking place that the said presiding judicial officer considers it to be in the interest of justice that a legal practitioner be appointed to represent the said prisoner. Upon receipt of such a notification by a presiding judicial officer the legal aid officer shall act as if the prisoner had applied for and qualified for legal aid.

4. Tariff

The fees and disbursements allowable to legal practitioners in respect of legal services that are rendered pursuant to the provisions of Section 3 (a) of the Criminal Matters Amendment Act, 1998 (Act No. 68 of 1998) shall be the same as those permitted to legal practitioners from time to time in terms of the representation of criminal accused in terms of the Guide.

ANNEXURE

Form A

MEANS TEST IN CONSTITUTIONAL MATTERS

LEGAL AID BOARD

LA.13B

MEANS TEST IN CONSTITUTIONAL MATTERS

Location:	Applicant:	Ref. No.:
		Applicant
GROSS INCOME: MONTHLY	Salary	R
Plus	Allowances	+ R
Plus	Subsidy	+ R
Plus	Bonuses	+ R
Plus	Interest	+ R
Plus	Rentals	+ R
Plus	Other	+ R
	TOTAL =	R
PLUS: PROPERTY		
IMMOVABLE: Reasonable market value	R	
Less Bonds	- R	

	= R
OTHER	
PROPERTY: Bank balances and savings	+ R
Investments and Deposits	+ R
Monies due to Applicant	+ R

		Applicant	
GROSS INCOME: MONTHLY	Salary		R
	Nett value	= R	
	DIVIDED by 120	R	+ R
	GROSS INCOME =		R
DEDUCTIONS			
Income Tax	R		
Unemployment Insurance	+ R		
Compulsory Group Insurance	+ R		
Medical Fund Contribution	+ R		
Pension Fund Contribution	+ R		
Rent or Mortgage Instalment (Max R1 000)	+ R		
Maintenance in terms of court order	+ R		
School fees and contributions*	+ R		
* Not applicable to private schools			
	TOTAL DEDUCTIONS =		– R
			+ R
	Calculated Income		= R
	Deduct R600 for Application		R
	SUB-TOTAL		– R
	Deduct R180 per child (if applicable) . . . × R180 =		= R
Dependents actually supported by the applicant			
Name	Age	Name	Age
Name	Age	Name	Age
Name	Age	Name	Age

Complete details of my salary, property and all other income and assets are correctly set out above. All details of my expenses are correctly set out. All the deductions are actually and regularly paid by me on a monthly basis. I realise that if any of the informatioun set out above is false or incomplete, legal aid will be suspended immediately, and I will be prosecuted for fraud.

Date:.....

Signature of Applicant:

.....

**Qualify for legal aid:
YES/NO**

Date:.....

Legal Aid Officer:

.....

Form B

**APPLICATION FOR THE PROVISION OF LEGAL REPRESENTATION AT STATE EXPENSE
IN TERMS OF SECTION 359 (3) (g) OF THE CONSTITUTION**

LEGAL AID BOARD

LA.13C

**APPLICATION FOR THE PROVISION OF LEGAL REPRESENTATION
AT STATE EXPENSE IN TERMS OF SECTION 359 (3) (g)
OF THE CONSTITUTION**

PARTICULARS OF APPLICANT'S INCOME AND EXPENDITURE

BRANCH OR MAGISTRATE'S OFFICE:
Reference Number:	NAME OF APPLICANT:
CHARGE(S) If more than one, record total:
CASE NUMBER:	IN WHICH COURT WILL TRIAL TAKE PLACE: Supreme Court/Regional Court/District Court* (*Delete those inapplicable) ANTICIPATED DURATION OF THE TRIAL

INCOME AND ASSETS		EXPENDITURE AND LIABILITES	
1. INCOME			
1.1 Salary	R	1.	R
1.2	R	2.	R
1.3	R	3.	R
2. ASSETS		4.	R
2.1 Immovable	Value	5.	R
Residence	R	6.	R

Other	R	7.	R
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INCOME AND ASSETS		EXPENDITURE AND LIABILITIES	
2.2 Movable	Value	TOTAL	R
Vehicle	R	Liabilities	
Furniture	R	1.	R
Other	R	2.	R
TOTAL	R	TOTAL	R

.....
Signature of applicant

.....
Signature of Legal Aid Officer

DATE:.....

GNR.656 of 16 May 2003: Requirements and Certificate for Peace Officers in terms of Section 334 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

I, Penuell Mpapa Maduna, Minister for Justice and Constitutional Development acting under and by virtue of the powers vested in me (1) by section 334 (3) (b) of the Criminal Procedure Act, 1977, hereby prescribe that the following shall appear in or on the certificate of appointment referred to in section section 334 (2) (a) of the Criminal Procedure Act, 1997 issued to any person falling within a category declared under section 334 of the Criminal Procedure Act, 1997, to be peace officers:

- (i) The full name of the person appointed;
- (ii) his/her identity number;
- (iii) his/her signature;
- (iv) his/her photograph;
- (v) a description of the capacity in which he/she was appointed;
- (vi) the name of the employer who made the appointment; and
- (vii) the signature and official stamp of the employer or responsible person.

Signed at Pretoria on this Second day of May Two Thousand and Three.

P.M. MADUNA
Minister for Justice and Constitutional Development
